No. 06-766
Title: New York State Board of Elections, et al., Petitioners
v.
Margarita Lopez Torres, et al.
Docketed: December 4, 2006
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (06-0635-cv)
Decision Date: August 30, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 28 2006	Petition for a writ of certiorari filed. (Response due January 3, 2007)
Dec 20 2006	Order extending time to file response to petition to and including January 12, 2007.
Jan 12 2007	Brief of respondents Margarita Lopez Torres, et al. in opposition filed.
Jan 12 2007	Brief amicus curiae of Republican National Committee filed.
Jan 12 2007	Brief amici curiae of Mid-Manhattan Branch of the NAACP, et al. filed.
Jan 12 2007	Brief amicus curiae of Asian American Bar Association of New York filed.
Jan 24 2007	DISTRIBUTED for Conference of February 16, 2007.
Jan 25 2007	Reply of petitioners New York State Board of Elections, et al. filed. (Distributed)
Jan 25 2007	Reply of petitioners New York County Democratic Committee, et al. filed. (Distributed)
Feb 20 2007	Petition GRANTED.
Mar 7 2007	Extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including May 7, 2007.
Mar 7 2007	Extension of time within which to file respondents' brief on the merits to and including July 11, 2007.
Apr 30 2007	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for petitioners New York State Board of Elections, et al.
May 2 2007	Motion of the parties to dispense with printing the joint appendix filed.
May 7 2007	Brief of petitioners New York State Board of Elections, et al. filed.
May 7 2007	Brief amicus curiae of Republican National Committee filed.
May 7 2007	Brief of petitioner Attorney General of the State of New York as Statutory Intervenor filed.
May 7 2007	Brief of petitioner The New York County Democratic Committee filed.
May 7 2007	Brief amici curiae of Mid-Manhattan Branch of the NAACP, et al. filed.
May 7 2007	Brief amicus curiae of Asian American Bar Association of New York filed.
May 7 2007	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for petitioner NY Republican State Committee.
May 7 2007	Brief amici curiae of The Cato Institute, et al. in support of neither party filed.
May 14 2007	Motion to dispense with printing the joint appendix filed by petitioners GRANTED. and the parties are directed to file 20 copies of the joint appendix and hearing exhibits filed in the United States Court of Appeals for the Second Circuit.
Jun 6 2007	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for the petitioners Assn. of NY State Supreme Court Justices in City and State of NY and Hon. David Demarest

Jun 13 2007	The time for filing respondents' brief on the merits is extended to and including July 18, 2007.
Jun 18 2007	20 copies of the joint appendix and hearing exhibits filed in the United States Court of Appeals for the Second Circuit received.
Jun 26 2007	Respondents' brief on the merits is ordered to be filed on or before July 13, 2007.
Jun 27 2007	Consent to the filing of amicus briefs in support of either party or neither party received from counsel for the respondents
Jul 12 2007	Brief amicus curiae of Edward I. Koch filed.
Jul 13 2007	Brief amicus curiae of New York County Lawyers' Association filed.
Jul 13 2007	Brief amicus curiae of John Dunne filed.
Jul 13 2007	Brief of respondents Margarita Lopez Torres, et al. filed.
Jul 13 2007	Brief amici curiae of Thomas Mann, et al. filed.
Jul 13 2007	Brief amici curiae of New York State Judges, et al. filed.
Jul 13 2007	Brief amici curiae of City of New York, et al. filed.
Jul 13 2007	Brief amicus curiae of Washington Legal Foundation filed.
Jul 13 2007	Brief amici curiae of Law Professors Guy-Uriel E. Charles, et al. filed.
Jul 13 2007	Brief amici curiae of Asian American Legal Defense and Education Fund, et al. filed.
Jul 13 2007	Brief amicus curiae of Charles J. Hynes, District Attorney for Kings County, NY filed.
Jul 13 2007	Brief amici curiae of American Civil Liberites Union, et al. filed.
Jul 23 2007	CIRCULATED.
Jul 27 2007	Motion for divided argument filed by petitioners. (Distributed)
Aug 14 2007	SET FOR ARGUMENT Wednesday, October 3, 2007.
Aug 14 2007	Record received from U.S.D.C. for the Eastern District of New York. (2 boxes)
Aug 15 2007	Record received from U.S.C.A. for the 2nd Circuit. (1 box)
Aug 17 2007	Reply of petitioners New York State Board of Elections, et al. filed. (Distributed)
Aug 17 2007	Reply of petitioners The New York County Democratic Committee, et al. filed. (Distributed).
Aug 17 2007	Reply of petitioner Attorney General of the State of New York as Statutory Intervenor filed. (Distributed)
Aug 20 2007	Motion for divided argument filed by petitioners GRANTED.
Sep 7 2007	Motion for leave to file amicus brief out of time filed by H. William Van Allen.
Oct 15 2007	Motion for leave to file amicus brief out of time filed by H. William Van Allen DENIED

70

No. (28)

11-28-2006

In The
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER, CAROL BERMAN, HELEN MOSES DONOHUE, and EVELYN J. AQUILA, in their official capacities as Commissioners of the New York State Board of Elections, New York County Democratic Committee, New York Republican State Committee, Associations of New York State Supreme Court Justices in the City and State of New York, and JUSTICE DAVID DEMAREST, individually, and as President of the State Association, ELIOT SPITZER, Attorney General of the State of New York,

Petitioners,

v.

MARGARITA LOPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER, Common Cause/NY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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City and State of New York,
Honorable David Demarest, J.S.C.

QUESTIONS PRESENTED

1. In *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court held that it is "too plain for argument" that a State may require intraparty competition to be resolved either by convention *or* primary. Did the Second Circuit run afoul of *White* by mandating a primary in lieu of a party convention for the nomination of candidates for New York State trial judge?

2. What is the appropriate scope of First Amendment rights of voters and candidates within the arena of intraparty competition, and particularly where the State has chosen a party convention instead of a primary as the nominating process?

   (a) Did the Second Circuit err, as a threshold matter, in applying this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974) and related ballot access cases, which were concerned with the dangers of "freezing out" minor party and non-party candidates, to internal party contests?

   (b) If *Storer* does apply, did the Second Circuit run afoul of *Storer* in holding that voters and candidates are entitled to a "realistic opportunity to participate" in the party's nomination process as measured by whether a "challenger candidate" could compete effectively against the party-backed candidate?

QUESTIONS PRESENTED – Continued

3. In *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) and *Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*) the Fourth and D.C. Circuits applied a rational basis balancing test to weigh the co-equal, but competing First Amendment rights of political parties in setting delegate selection rules against those of voters and candidates. Did the Second Circuit err in preferring the First Amendment rights of voters and candidates by first determining that New York's convention system severely burdened those rights and then subjecting the party's rights to strict scrutiny review?

PARTIES TO THE PROCEEDING

Petitioners are the New York State Board of Elections, the New York County Democratic Committee, the New York Republican State Committee, the Associations of New York State Supreme Court Justices in the City and State of New York, Justice David Demarest, individually, and as President of the State Association, and Eliot Spitzer, Attorney General of the State of New York.

Respondents are Margarita López Torres, Steven Banks, C. Alfred Santillo, John J. Macron, Lili Ann Motta, John W. Carroll, Philip C. Segal, Susan Loeb, David J. Lansner, and Common Cause/NY.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Procedural History	5
B. New York's Legislature Adopted The Judicial Convention After A Failed Experiment With Primaries	6
1. Origins of the Judicial Convention	6
2. Convention Mechanics	7
C. Plaintiffs' Constitutional Challenge Rests On The Flawed Assumption That Challenger Candidates Have A Right To Appeal Directly To Voters And Circumvent The Party Structure	8
D. The District Court Finds The Judicial Convention System Unconstitutional Based On Its Concocted "Meaningful Participation" Standard And Installs A Primary In Its Place	9
E. The Second Circuit Affirms Based On A Slightly Refined, Although Equally Flawed, First Amendment Construct	11
REASONS FOR GRANTING THE PETITION	14

TABLE OF CONTENTS – Continued

Page

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULING IN *AMERICAN PARTY OF TEXAS V. WHITE*, WHICH EMBRACES CONVENTIONS AS A CONSTITUTIONAL ALTERNATIVE TO DIRECT PRIMARIES FOR SELECTING CANDIDATES 14

II. THE COURT SHOULD GRANT THE PETITION TO SETTLE THE APPROPRIATE SCOPE OF VOTERS' FIRST AMENDMENT RIGHTS IN A PARTY NOMINATING CONVENTION AND TO RESOLVE THE CONFLICT WITH *STORER V. BROWN*, WHICH MERELY ENSURES BALLOT ACCESS, NOT ELECTORAL VICTORY 17

A. This Court Should Resolve Whether The Scope Of First Amendment Rights In *Intraparty* Competition Is Governed By Its Existing Ballot Access Jurisprudence 19

B. If This Court's *Storer* Line Of Ballot Access Decisions Does Apply To The Scope Of Voters' First Amendment Rights In *Intraparty* Competition, The Second Circuit Departs From This Court's Jurisprudence In Reformulating The *Storer* Test..... 21

TABLE OF CONTENTS – Continued

Page

III. THE SECOND CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH TWO OTHER CIRCUITS OVER THE APPROPRIATE CONSTITUTIONAL STANDARD FOR REVIEWING POLITICAL PARTY RULES GOVERNING THE SELECTION OF CONVENTION DELEGATES 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

American Party of Texas v. White, 415 U.S. 767 (1974) ..... *passim*

Anderson v. Celebrezze, 460 U.S. 780 (1983) ... 19, 20, 21, 28

Ayotte v. Planned Parenthood of Northern New England, 126 S. Ct. 961 (2006) 6, 16

Bachur v. Democratic National Party, 836 F.2d 837 (4th Cir. 1987) 4, 24, 27, 28, 29

Bullock v. Carter, 405 U.S. 134 (1972) 19, 20, 24

Clements v. Fashing, 457 U.S. 957 (1982) 24

Cousins v. Wigoda, 419 U.S. 477 (1975) 4, 16, 27

Jenness v. Forston, 403 U.S. 431 (1971) 19, 20

LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir. 1998) 26

Lubin v. Panish, 415 U.S. 709 (1974) 20, 23

O'Brien v. Brown, 409 U.S. 1 (1972) 26

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 3, 23

Ripon Society v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) ..... *passim*

Storer v. Brown, 415 U.S. 724 (1974) ..... *passim*

Terry v. Adams, 345 U.S. 461 (1953) 19, 20

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 4

TABLE OF AUTHORITIES – Continued

Page

Trinsey v. Commonwealth of Pa., 941 F.2d 224 (3d Cir. 1991) 15

U.S. v. Classic, 313 U.S. 299 (1941) 19

Williams v. Rhodes, 393 U.S. 23 (1968) 19, 20, 21, 23

STATUTES

28 U.S.C. § 1254(1) 1

N.Y. Elec. L. § 6-106 ..... 1, 5, 10

N.Y. Elec. L. § 6-124 ..... 2, 5, 10

N.Y. Elec. L. § 6-158 5

MISCELLANEOUS

Report of the Joint Legislative Comm. On Court Reorganization, Legis. Ref. 75-17210, Doc. No. 24 (1973) 8

Report of the Commission to Promote Public Confidence in Judicial Elections available at http://www.ny.courts.gov/reports/JudiciaElections Report.pdf 11

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, App. 1-92, is reported at 462 F.3d 161 (2d Cir. 2006).

The opinion of the United States District Court for the Eastern District of New York, App. 93-191, is reported at 411 F. Supp. 2d 212 (E.D.N.Y. 2006).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 30, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the Constitution of the United States

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV to the Constitution of the United States

§ 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Election Law

§ 6-106: Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

§ 6-124: A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified list and if an equal number of votes were cast for two or more such alternates, the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate; substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

STATEMENT OF THE CASE

This case involves the constitutionality of the method of selection for all trial court judges of general jurisdiction throughout New York State. The lower courts declared

unconstitutional on First Amendment grounds New York's 85 year-old statutory scheme used to nominate major party candidates, known as the judicial convention system, and mandated that this election method be replaced by direct primaries – the precise system which New York's legislature specifically rejected in 1921.

Not only does this case directly impact the dispensation of justice to all New Yorkers, but the faulty legal principles on which the Second Circuit's decision rests pose a threat to the process by which political parties select their candidates nationwide and to basic principles of representative democracy. The Second Circuit assessed New York's judicial convention system by whether rank-and-file voters and so-called challenger candidates are afforded a "realistic opportunity to participate" – an amorphous standard that can only be measured by the outcome of elections. Petition Appendix at 41 (hereinafter, "App. ___."). The core thesis of the Second Circuit's opinion was that party leaders in New York have too much influence over the selection of judicial candidates and that "challenger candidates," vaguely defined as those who "lack[ ] the party machinery," (App. 59), cannot effectively compete with the party's favored candidates, thereby depriving voters of their purported First Amendment right to choose the nominee.

Yet, when considered from the proper perspective of each participant's designated role in the process, rather than the Second Circuit's skewed challenger candidate view, all of the various participants have access to the system and the burdens on the right to vote are slight. *See Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (state "must accord the participants in that process . . . the First Amendment rights that attach to their roles"). Voters have the unfettered right to vote for delegates of their choosing who share their interests and values and who will advance them in the convention process. Elected delegates, in turn, have the right to select judicial candidates of their choosing. An individual voters' opportunity to cast a ballot for his preferred delegate fully

vindicates that voter's First Amendment rights irrespective of whether there is any realistic chance that the delegate himself will be elected, let alone have his preferred judicial candidate nominated at the convention. *See Cousins v. Wigoda*, 419 U.S. 477, 489 (1975).

The danger of the Second Circuit's unbounded inquiry into party politics is manifest: it invites judicial review of potentially every contest for a party's nomination whether by convention or primary. Wherever party leaders are dominant, disfavored candidates within the party or anyone else seeking to challenge party rule can invoke the First Amendment as a blunt instrument to aid their cause. *See* App. 30 ("it is not the decision of the voters . . . but the relative strength of political parties . . . [that] determines the outcome of these elections"). The inevitable result is "splintered parties and unrestrained factionalism," precisely what the drafters of the Constitution warned against. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 368 (1997) (citing Federalist No. 10 (Madison) and quoting *Storer*, 415 U.S. at 736). More fundamentally, by determining that the First Amendment requires that candidates have a right to appeal directly to rank and file members rather than to locally elected delegates, and by fashioning a broad remedy that was not tailored to address the purported constitutional deficiency, the Second Circuit effectively banned political conventions as a candidate selection device, leaving direct primaries as the only constitutionally permissible method.

The Court should grant *certiorari* to resolve the conflict between the Second Circuit's decision and *American Party of Texas v. White*, *Storer v. Brown* and other decisions of this Court, which uphold the constitutionality of party conventions and appropriately confine the scope of ballot access rights to ensuring that state election regulations are non-discriminatory and do not freeze out minor parties and independent candidates. The Court should also grant *certiorari* to resolve the conflict between the Second Circuit's decision and those of the D.C. Circuit in *Ripon* and the Fourth Circuit in *Bachur* with respect to

the First Amendment rights of political parties and the appropriate balancing test to be applied where the rights of parties conflict with those of voters and candidates.

A. Procedural History

Plaintiffs, individual voters and would-be judicial candidates, brought this action on March 14, 2004, against the New York State Board of Elections (the "Board of Elections") for declaratory and injunctive relief challenging the constitutionality of New York's judicial convention system and seeking permanent injunctive relief installing a primary system in its place. App. 30-31. On June 9, 2004, Plaintiffs filed a motion for a preliminary injunction seeking to enjoin the Board of Elections' enforcement of the three New York State Election Law statutes codifying the convention system, N.Y. Elec. L. §§ 6-106, 6-124 and 6-158, on grounds that they deny citizens and candidates equal protection under the law, and violate the First and Fourteenth Amendments by imposing undue burdens on candidates seeking a political party's nomination for State Supreme Court Justice. *See* App. 31.

The Attorney General of the State of New York appeared as statutory intervenor in defense of the challenged statutory provisions. As parties directly affected by the action, the following intervened as Defendants: the New York County Democratic Committee, the New York Republican State Committee, the Association of Supreme Court Justices of the State of New York, the Association of Supreme Court Justices of the City of New York, and Justice David Demarest, individually, and as President of the State Association. App. 31.

On January 26, 2006, the United States District Court for the Eastern District of New York issued its decision declaring the convention system unconstitutional and ordering that primary elections be held for major party candidates until the Legislature adopts a new statutory scheme. App. 31, 95-96. In doing so, the district court dismantled a carefully-crafted electoral system that has operated effectively to select a highly regarded judiciary

since it was enacted 85 years ago. It did not attempt to preserve the convention system that New York's legislature chose by attempting to cure the perceived constitutional defects, but instead issued a sweeping ruling that substituted primaries for conventions. *Cf. Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961, 968 (2006)

On August 30, 2006, the Second Circuit issued an opinion affirming the district court's decision in its entirety, holding that the district court properly determined that Plaintiffs were likely to succeed on the merits of their constitutional challenge, and its issuance of a mandatory injunction imposing an open primary was an appropriate remedy. App. 6.

B. New York's Legislature Adopted The Judicial Convention After A Failed Experiment With Primaries

1. Origins of the Judicial Convention

In 1846, New York amended its Constitution to provide for the popular election of Supreme Court Justices. App. 9. Without statutes providing otherwise, a party's judicial candidates for the State Supreme Court were chosen by the same method as other candidates for State office, which at the time, was by party convention. App. 9.

In 1911, during a nationwide wave of populism, the Legislature changed the law to provide for Supreme Court nominations by primary election – a then-relatively new mechanism for selecting candidates. App. 9. But over the next nine years, the primary system proved to be a poor means of selecting qualified individuals for the bench. Critics, including the press and leading bar associations, condemned the primary as burdensome and expensive, and warned that it facilitated the sale of judgeships to the highest bidder, thus threatening judicial independence. App. 9. Critics also disapproved of the primary system because the need to raise large sums of money enhanced the undue influence of political bosses over the nominating

process given their control over the party's large election apparatus. App. 9.

To eradicate these widespread concerns, the Legislature, in 1921, restored the convention system, which rested on familiar principles of representative democracy. App. 10. The convention system entrusted the nominating function to a body of locally-elected delegates, who, as representatives of the people and unpledged to any candidate, would gather at party conventions for each Judicial District to nominate the party's candidate who would appear on the general election ballot in November. App. 10.

2. Convention Mechanics

There are twelve Judicial Districts across the State from which candidates for Supreme Court Justices are nominated and elected. App. 11, 101. Each Judicial District is comprised of one or more counties. App. 86, 101. Delegates to the convention are elected at a party primary election held in September from smaller geographic areas within each Judicial District called Assembly Districts, the same political subdivisions from which New Yorkers elect their representatives to the State Assembly. App. 11, 101, 104. Although the number of delegates for each Assembly District is governed by each party's internal rules, the Election Law requires that the allotted number be substantially proportional to the percentage of total votes cast statewide for the party's gubernatorial candidate in the last general election. App. 11-12, 104-105.

Any enrolled member of a recognized political party residing within the Judicial District may run for delegate. The only requirement to get on a primary ballot for delegate is to gather 500 valid signatures from enrolled party members in the Assembly District within the petitioning period in the spring. App. 12, 108.

New York's judicial convention system is similar to the national party conventions that are used to select presidential candidates. The principal difference between the two is that delegates to the national conventions fill only

one position with one candidate, while New York's judicial delegates are generally called upon to fill multiple vacancies from an array of candidates. For that reason alone, judicial delegates are not intended to be pledged to any particular candidate. *See* App. 107.

Although the merits of the judicial nominating convention have been the subject of serious public debate through the years, New York's legislature has chosen to leave the system intact for 84 years. *See* App. 10. Indeed, at New York's constitutional convention in 1967, a proposal to replace the judicial convention with primaries was hotly debated, but ultimately rejected. Likewise, in 1973, the Joint Legislative Committee on Court Reorganization recommended that while judges on the Court of Appeals should be selected by gubernatorial appointment, the selection of trial court judges by judicial convention should remain in place. *See Report of the Joint Legislative Comm. On Court Reorganization*, Legis. Ref. 75-17210, Doc. No. 24, at 12 (1973). The Legislature heeded this recommendation.

C. Plaintiffs' Constitutional Challenge Rests On The Flawed Assumption That Challenger Candidates Have A Right To Appeal Directly To Voters And Circumvent The Party Structure

Plaintiffs allege that the convention system denies citizens the opportunity to vote for the candidates of their choice because the system poses insurmountable burdens to so-called "challenger candidates" – defined as those candidates lacking political party support. App. 156-158. In their view, the Constitution requires that these candidates have the right to circumvent the party structure and appeal directly to rank and file members to obtain the party's nomination.

To advance their case, Plaintiffs portray a system dominated by party bosses who purportedly handpick judicial delegates, control how they vote, and dictate the outcome of the convention. Under such a system, according to Plaintiffs, a challenger candidate who lacks the party's

imprimatur has no hope of success. App. 114, 131, 140, 158. Never mind that any party member can run for delegate, delegates are free to vote their consciences and challengers have the opportunity to lobby delegates for support. App. 69, 113-114. Never mind that candidates have alternative means to the general election ballot. App. 54, 160-161 (requiring only 3500 petition signatures to petition on to the ballot as an independent). Plaintiffs contend that to run a successful challenge against the party machinery, a challenger candidate must recruit and get elected sufficient judicial delegates pledged to her candidacy across the Judicial District to control the convention. Given the number of signatures necessary to petition delegate candidates onto a primary ballot, the geographical size of a Judicial District, the purported need to educate voters regarding which delegates are pledged to the candidate's candidacy, and the cost involved in such an endeavor, Plaintiffs claim that a challenger candidate is doomed to fail. App. 104-109, 158.

While Defendants hotly contest Plaintiffs' view of the judicial convention system and the trial record includes a great deal of contradictory evidence, such as the testimony of numerous sitting Justices across the State showing how they captured the nomination by successfully lobbying sufficient delegates to win the support of party leaders who did not initially back their candidacies, (App. 67-70, 122-125), these factual disputes are immaterial to this petition. At issue are starkly different views as to the nature and scope of the First Amendment rights that attach where a state prescribes that parties select their candidates through a delegate-based convention.

D. The District Court Finds The Judicial Convention System Unconstitutional Based On Its Concocted "Meaningful Participation" Standard And Installs A Primary In Its Place

Notwithstanding the wealth of evidence to the contrary, the district court held that New York State's convention system violates the First Amendment. It concluded that

major party leaders, not the delegates or voters, control who becomes a New York Supreme Court Justice. App. 95. In doing so, the district court adopted wholesale Plaintiffs' "challenger candidate" paradigm and crafted a constitutional right to "participate meaningfully" in the nomination process. App. 163. Reformulating the test in *Storer v. Brown* for independent candidates seeking access to the general election ballot, the district court asked:

> Could a reasonably diligent challenger candidate for Supreme Court Justice *succeed* in getting her own delegates and alternates on the ballot in each Assembly District? If not, could she *succeed* in lobbying the delegates installed by the party leaders?

App. 167 (emphases added) (citations omitted). Thus, the district court laid bare a constitutional analysis that ultimately turns on whether challenger candidates have a reasonable chance of *winning* their party's nomination.

As an interim remedy, the district court, rather than narrowly tailoring the relief in a way that would preserve as much of the Legislature's intent as possible, swept aside the judicial nominating convention, enjoining enforcement of N.Y. Elec. L. § 6-106 and use of the procedures set forth in N.Y. Elec. L. § 6-124. In its place, the district court ordered that nomination of Supreme Court Justices be made by primary election. App. 183-184.

Defendants filed a notice of appeal on February 7, 2006, and in light of the immediate impact that the district court's decision would have on incumbents running for re-election in November 2006, moved the district court for a stay pending appeal. The district court granted the stay motion on March 3, 2006, ordering that its decision would not take effect until after the 2006 general election. App. 33. On March 14, 2006, the United States Court of Appeal entered an order expediting the appeal. App. 33.

The district court's unprecedented decision not only received extensive news coverage and editorials in New York's major newspapers and daily law journal, but it immediately triggered a frenzy within the State bar. Public debate ensued over the appropriateness of the district court

decision, the impact on incumbents and the best method to select judges. Notably, less than one month after the district court's decision, the New York State Commission to Promote Public Confidence in Judicial Elections appointed by Chief Judge of the New York Court of Appeals Judith Kaye and chaired by John Feerick, former Dean of Fordham Law School (the "Feerick Commission"), issued its final report, concluding that conventions are preferable to primaries for nominating candidates for the office of Supreme Court Justice, and suggesting that the system be maintained with certain reforms adopted to improve it.[1]

E. The Second Circuit Affirms Based On A Slightly Refined, Although Equally Flawed, First Amendment Construct

The appeal to the Second Circuit attracted a great deal of interest. Some twenty organizations and individuals, including the State's and City's leading bar associations, civic groups and minority bar associations weighed in on various sides of the issues as *amici curiae* in the Second Circuit appeal. At the Second Circuit's specific request, the New York State Legislature filed an *amicus* brief in which it supported reversal of the district court's decision. On June 9, 2006, the Second Circuit panel heard over two hours of oral argument before a courtroom filled to capacity with state court judges, public officials, prominent members of the bar, and members of the press.

On August 30, 2006, the Second Circuit affirmed, holding that the district court (1) properly concluded that Plaintiffs demonstrated a clear likelihood of success on the merits of their First Amendment claim, (2) properly enjoined the judicial nominating convention, and (3) appropriately required that party nominations proceed via direct primary election until the Legislature enacts a new

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[1] *See* Report of the Commission to Promote Public Confidence in Judicial Elections ("Feerick Report") available at http://www.nycourts.gov/reports/JudicialElectionsReport.pdf.

nominating mechanism. In reaching its conclusion, the Second Circuit sought to improve on the district court decision where it fell short by articulating a more refined – although equally flawed – standard than the district court's "meaningful participation" test. *See* App. 41, 44.

The circuit court first determined that the First Amendment applies to the nominating phase (an issue never in dispute) and concluded that New York must afford "voters and candidates the right to associate through and in the judicial nominating process." App. 41. In expounding on the scope of this purported right, the circuit court held that candidates and voters alike must have "a *realistic opportunity* to participate in the nominating process." App. 41, 44 (emphasis added).

In measuring whether the convention system satisfies its amorphous "realistic opportunity" standard, the Second Circuit followed the Plaintiffs and the district court in adopting the perspective of a "challenger candidate," defined as "a reasonably diligent candidate who, although possessing public support, lacks the resources provided by a supportive political party and has no other means of overcoming the burdens that the system imposes." App. 60. The Second Circuit claimed to find support for the "challenger candidate" paradigm in this Court's decision in *Storer v. Brown*, where the relevant inquiry was whether "a reasonably diligent *independent* candidate [can] be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot." App. 60 (emphasis added). However, the *Storer* strand of ballot access cases was concerned with laws that "freeze out" minor parties and independent candidates. They did not address intraparty contests at all. Accordingly, the Second Circuit's ruling rests on the unexamined assumption that the *Storer* standard can be applied to internal conflicts within a party. *See* App. 41-44.

In applying the *Storer* test to the context of intraparty competition, the circuit court determined that the burdens imposed by the convention system were severe. The court supported this conclusion based on the district court's

finding that, under New York's delegate-based convention system, the possibility of successfully lobbying party-backed delegates is "non-existent" and challenger candidates can never satisfy the signature requirements for running their own pledged delegates. However, successful lobbying of delegates amounts to winning the nomination, and running delegates pledged to specific candidates is the functional equivalent of a primary. Thus, the Second Circuit fundamentally changed the meaning of *Storer* by equating the right to access the general election ballot in *Storer* with either the right to win a party nomination or the right to have direct access to voters. But this Court has never found either such right to exist.

On the basis of this flawed standard, the Second Circuit agreed with the district court that New York's convention system is a boss-dominated process inaccessible to rank-and-file voters and challenger candidates, and went further by holding that voters' and candidates' associational rights to participate in the process outweigh the associational rights of political parties to determine how to best select their standard bearers. App. 45-46, 49-53. Thus, while the Second Circuit paid lip-service to a political party's right to publicly endorse and support a candidate of its choosing, it is clear that it is the effect of such support on the convention process that the circuit court found constitutionally offensive. App. 53-54.

The Second Circuit's decision will significantly affect all incumbent Supreme Court Justices across the State, many of whom face re-election in 2007. Having served on the bench for 14-year terms, these trial court judges are suddenly faced with the daunting task of re-entering politics. To compete effectively in primaries they will be under pressure to solicit funds from lawyers that may appear before them or even to render politically popular decisions. Even with respect to vacant seats, open primaries would threaten the integrity and judicial independence of New York's Supreme Court bench by ushering a new era of big money politics into the judicial selection process.

A definitive ruling by the Court clarifying the constitutional rights that apply to New York's judicial nominating

convention would thus serve a compelling public interest in New York and because such a ruling would almost certainly address party conventions or other nominating systems more generally, it would provide an important opportunity for this Court to develop its First Amendment jurisprudence.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RULING IN *AMERICAN PARTY OF TEXAS V. WHITE*, WHICH EMBRACES CONVENTIONS AS A CONSTITUTIONAL ALTERNATIVE TO DIRECT PRIMARIES FOR SELECTING CANDIDATES

The Court should grant *certiorari* to resolve the clash between the Second Circuit's decision, which mandates a primary in lieu of party convention for the nomination of candidates for New York state trial judge, and the Court's decision in *American Party of Texas v. White* which holds that it is "too plain for argument" that the state may require intraparty competition to be resolved either by convention *or* primary. 415 U.S. at 781. The Second Circuit's overly expansive view of the First Amendment as affording "voters and candidates the right to associate through and in the judicial nominating process," (App. 41), effectively requires that rank and file voters have a direct vote in the selection of a party's nominee. This erroneous view dictates the equally erroneous result that forms of representative democracy, like the delegate-based convention at issue here, cannot pass constitutional muster because they do not involve direct appeal to voters. If permitted to stand, the Second Circuit's ruling would eviscerate this Court's holding in *White* by requiring as a practical matter that all nominations proceed by primary.

In *White*, the Supreme Court rejected a challenge to a Texas ballot qualification system under which the major political parties were required to nominate candidates by primary elections, smaller parties could use either primaries or nominating conventions, and new and even smaller

parties had to use precinct nominating conventions. 415 U.S. 767. Justice White, writing for seven other Justices, stated: "[i]t is too plain for argument . . . that the State may [properly] limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." *Id.* at 781 (citing *Storer v. Brown*, 415 U.S. at 733-736) (emphasis added); *Trinsey v. Commonwealth of Pa.*, 941 F.2d 224, 234 (3d Cir. 1991) (according to "available precedent . . . the Supreme Court views the manner in which the nominees are selected to have been left to the discretion of the states") (quoting *White*, 415 U.S. at 781). *White's* ruling that a convention is a constitutional alternative to a primary would be rendered meaningless if a convention must be the functional equivalent of a primary.

Confronted with *White*, the Second Circuit ostensibly acknowledges, as it must, that a convention system is, at least, "in the abstract, a perfectly acceptable method of nomination." App. 46. But the Second Circuit then proceeds to evade entirely the relevant issue by focusing on a straw man argument, namely Petitioners' purported claim that "all such [convention] systems, regardless of how they are implemented, are constitutional." App. 46. Petitioners have never claimed that conventions are *per se* constitutional. While the Second Circuit may be right that "*White* gave no categorical blessing to nomination conventions generally, or to the unique hybrid scheme at issue here," (App. 47), it simply cannot be the case that *none* of them is constitutional.

But no true convention system could be constitutional under the Second Circuit's extreme view of the First Amendment for the very reason that it places delegates between voters and candidates. The Second Circuit's theory is that New York "must afford voters and candidates the right to associate through and in the judicial nominating process" and that "the First Amendment prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." App. 41, 44. *See also* App. 166 (as the district court put it, "more open and

effective participation by voters must be allowed at the nomination stage, and candidates must be permitted an effective means of appealing to the voters when it counts."). Thus, the practices which the lower courts held to be a severe burden on voters' rights to vote and associate were simply the "network of facially innocent provisions" (App. 44) which comprise a convention system where delegates elected to serve as party representatives, not rank and file party members, choose candidates. But the First Amendment rights of individual voters are fully secured when they are given the opportunity to vote for delegates of their choice and there is no constitutional right to a direct plebiscite in the selection of candidates. *See Cousins v. Wigoda*, 419 U.S. 477, 489 (1975) ("respondents overlook the significant fact that the suffrage was exercised at the primary election to elect delegates to a National Party Convention.").

It is telling that neither the Second Circuit nor the district court was able to describe a true convention system that would pass muster under their constitutional analysis. Plaintiffs likewise identify only conventions that were the functional equivalent of primaries, such as conventions open to all enrolled party members or where pledged delegates on the primary ballot simply serve as proxies for the candidates. Thus, under the Second Circuit's construct, only direct primaries or their equivalent would survive scrutiny.

If some form of a true delegate convention must be constitutionally permissible, as *White* requires, then the lower courts should not have completely dismantled New York's chosen election method and replaced it with a primary. Instead, consistent with this Courts' directive in *Ayotte v. Planned Parenthood of Northern New England*, 126 S.Ct. 961 (2006), the remedy should have been narrowly tailored to fit the purported constitutional defect in light of legislative intent. "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature." *Id.* at 968 (citations omitted). Rather than

disregard the legislature's express intent to *avoid* primaries, the lower courts should have tailored the remedy to address the conventions' purportedly offending features, while still preserving the convention system itself. Several remedial options exist that would have done far less violence to the Legislature's choice than the remedy ordered by the district court. Among other things, the court could have considered: (1) reducing the number of petition signatures required; (2) decreasing the number of delegates; (3) extending the time period before the convention to give more time for candidates to lobby and delegates to deliberate; and (4) ordering the political parties to address the convention. Feerick Report at 30-36. But the Second Circuit chose to thwart the Legislature's choice, upholding the invalidation of the convention system and its replacement with a primary. In imposing this remedy, the Second Circuit made plain that it would consider nothing short of the installation of a direct primary to be constitutional, in direct conflict with this Court's decision in *White*.

II. THE COURT SHOULD GRANT THE PETITION TO SETTLE THE APPROPRIATE SCOPE OF VOTERS' FIRST AMENDMENT RIGHTS IN A PARTY NOMINATING CONVENTION AND TO RESOLVE THE CONFLICT WITH *STORER V. BROWN*, WHICH MERELY ENSURES BALLOT ACCESS, NOT ELECTORAL VICTORY

This case raises a fundamental constitutional issue of national importance: what are the First Amendment rights of voters and candidates within the arena of intraparty competition, and specifically what are those rights where the State has chosen party convention as the nominating process? In answering that question, the Second Circuit intruded in unprecedented fashion upon the prerogative of parties to choose their candidates. And, its analysis was flawed from the outset in that it injects this Court's standard designed to measure ballot access for minor party and independent candidates at the *general*

election phase to an entirely different electoral process at an entirely different phase of the election.

The *Storer v. Brown* strand of ballot access cases is concerned with laws that "freeze out" minor parties and independent candidates from gaining access to the general election ballot and thereby grant the two major parties an effective monopoly on political participation. The Second Circuit's ruling rests on the assumption that *Storer's* "reasonably diligent *independent* candidate" standard applies to an internal conflict within a party – an entirely different context where there is no concern that different political viewpoints will be silenced. *See* App. 41-44 (emphasis added). Arguably, the most that can be said about the *Storer* line of cases is that a *party or an independent candidate* has a right to access the ballot, not that any *particular candidate within a party* has such a right. Consequently, it is unclear whether these "freeze out" decisions even apply to the scope of First Amendment rights within *intraparty* competition. If not, the fundamental constitutional issue presented by this petition – the First Amendment standard governing intraparty contests – would remain an open question awaiting this Court's needed resolution. Thus, the Court should grant *certiorari* to determine whether *Storer v. Brown* even applies to the instant case.

Alternatively, if *Storer* does apply in the intraparty context, the Court should grant *certiorari* because the Second Circuit's decision actually conflicts with *Storer*, as well as other decisions of this Court. All *Storer* establishes is the right of independent candidates to petition onto the general election ballot, but it does nothing to improve their long odds of winning against established party candidates. Petitioners submit that the equivalent of ballot access in this case is convention access, *i.e.*, the right to have a candidate's name put up for consideration by the delegates. *Storer* cannot be translated, as the Second Circuit would have it, into entitling candidates to "reasonable participation" in the nomination phase, which the Second Circuit insists must be either direct, unmediated access to rank-and-file party members or a reasonable chance of

convincing elected delegates to award them the nomination. Thus, to the extent *Storer* does apply, granting this petition would allow this Court to resolve the conflict over the appropriate application of *Storer* in the intraparty arena.

A. This Court Should Resolve Whether The Scope Of First Amendment Rights In *Intraparty* Competition Is Governed By Its Existing Ballot Access Jurisprudence

This petition should be granted to settle the scope of the First Amendment rights of voters and candidates at the nomination phase, particularly within the context of a true delegate-based convention system. This Court has not settled that question in its long line of ballot access decisions and, certainly, has never applied the *Storer* test to intraparty competition.

As an initial matter, the Second Circuit's claim that its "realistic opportunity to participate" standard is "derive[d] directly" from this Court's "freeze out" line of ballot access cases in *Williams v. Rhodes*, 393 U.S. 23 (1968), *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Jenness v. Forston*, 403 U.S. 431 (1971) does not survive examination.[2] App. 41-44. *Rhodes*, *Celebrezze* and *Jenness* all

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[2] The Second Circuit, like Plaintiffs and the district court, also cites to *Bullock v. Carter*, 405 U.S. 134 (1972) to support its "realistic opportunity to participate" standard. *See* App. 42-43. But *Bullock*, which is part of a different strand of the Court's ballot access jurisprudence that involves invidious discrimination, is irrelevant for purposes of determining the scope of the First Amendment right at issue here. *Bullock*, like *U.S. v. Classic*, 313 U.S. 299 (1941) and *Terry v. Adams*, 345 U.S. 461 (1953), merely establishes a proposition that is not in dispute here: the state action requirement for triggering constitutional protection against invidious discrimination is satisfied at the nominating phase. Unlike *Bullock*, which involved exclusionary filing fees, or *Classic*, which involved ballot tampering, or *Terry* which involved racial discrimination – all of which were decided on Fourteenth Amendment or even Fifteenth Amendment grounds – this case involves none of these invidious practices and raises only voting and associational rights under the First Amendment. Of course, if the challenged provisions were discriminatory, such as in the notorious "white primary" cases

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involved interparty competition and addressed the issue of whether the election schemes at issue were designed to "freeze out" minor party candidates and non-party, independent candidates from the political process by effectively denying them general election ballot access. Those cases merely hold that election schemes that exclude minor parties or independent candidates from the political process are unconstitutional and thus they have no application to the present controversy. *See Rhodes*, 393 U.S. at 30 (acknowledging a party's fundamental First Amendment rights, the Supreme Court concluded that "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot"); *Celebrezze*, 460 U.S. at 787, 793 (reiterating fundamental principle of *Rhodes* that "[t]he right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot,'" (citations omitted), and concluding that "[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment"); *Jenness*, 403 U.S. at 439 (distinguishing *Rhodes*, in part, because challenged statute "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life").

Far from articulating a different standard, *Storer v. Brown* is just another variation of a *Rhodes* "freeze out" case. Indeed, the *Storer* test was actually designed to assess effective exclusions of minor party and non-party candidates that freeze the status quo. In *Storer*, the

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(*e.g.*, *Terry*) or the exclusionary filing fees struck down in *Bullock* and *Lubin v. Panish*, 415 U.S. 709 (1974), they would be unconstitutional under the equal protection clause.

Supreme Court was asked to determine the constitutionality of, among other statutes, a provision that required independent candidates to collect signatures from 5 percent of the total votes cast in California at the last general election within a 24-day period. *Id.* at 738-740. In that context, the Court posed this question: "could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it only be rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.* at 742. Specifically, the Court emphasized that "to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. No discernible state interest justified the burdensome and complicated regulations that in effect made impractical any alternative to the major parties." *Id.* at 746.

Thus, this Court's long line of "freeze out" decisions sheds no light on the constitutionality of election systems governing party nominations, as intraparty competition does not implicate the danger of "confer[ing] an effective political monopoly on the two major parties." *Storer*, 415 U.S. at 729. *See also Anderson*, 460 U.S. at 794 ("[i]n short, the primary values protected by the First Amendment ... are served when election campaigns are not monopolized by the existing political parties"). This petition, therefore, should be granted to resolve, as a threshold matter, whether the *Rhodes* and *Storer* line of "freeze out" cases even applies to determine the scope of First Amendment rights at the nomination phase. To the extent such decisions do not apply here, then this petition would provide this Court with the opportunity to articulate the scope of that fundamental First Amendment right.

B. If This Court's *Storer* Line Of Ballot Access Decisions Does Apply To The Scope Of Voters' First Amendment Rights In *Intraparty* Competition, The Second Circuit Departs From This Court's Jurisprudence In Reformulating The *Storer* Test

To the extent that the *Storer* line of cases applies to the nomination phase, this petition would present this

Court with the opportunity to resolve the conflict over the application of the *Storer* test to intraparty competition. The Second Circuit erroneously equated the right to *access* the general election ballot in *Storer* with either the right to win a party nomination outright or the right to have direct unmediated access to voters. But this Court has never found either such right to exist. For these two independent reasons, the Second Circuit's decision fundamentally collides with this Court's *Storer* decision and the rest of its ballot access jurisprudence.

Going well beyond *Storer*, the Second Circuit agreed with the District Court's conclusion that the burdens imposed by the convention were severe because the possibility of lobbying party-backed delegates is "non-existent" and "challenger candidates" can "never" satisfy the signature requirements for running their own pledged delegates. *See* App. 45. But the equivalent of ballot position cannot be (1) successfully lobbying the chosen delegates or (2) satisfying the signature requirements for running one's own slate of pledged delegates throughout the district.

The first option – *successful* lobbying – amounts to winning the nomination, not merely competing for it. Even the Second Circuit implicitly acknowledges that a right to win standard would be constitutionally erroneous. *See* App. 45. Yet, the Second Circuit rests its decision on the district court's determination that it is practically impossible for disfavored candidates to lobby delegates because of the influence of party leaders. *See* App. 45-46. While petitioners dispute that premise, even assuming its validity, the fact that the Second Circuit relied upon convention *outcomes* in rendering its decision demonstrates just how far the lower court departed from established First Amendment law. Would the outcome have been different if party leaders were less influential or if delegates had maverick tendencies? Faithfully applying the same analytical approach to primaries would lead to a finding of unconstitutionality in most instances where as a practical matter party leader support dictates the outcome.

See App. 192-194 (observing that "election" of New York City Civil Court judges by primary is generally nothing more than appointment by powerful party leaders). It is an unalterable political reality in all systems that party leaders have enormous influence over the selection of candidates. The Constitution cannot be a guarantor of electoral success for disfavored party candidates and the Second Circuit's effort to make it one is a recipe for mischief.

The second option the Second Circuit identifies – running pledged delegates – is deeply problematic because it insists upon unmediated access between voters and candidates. From a Constitutional perspective, finding that candidates have a right to run pledged delegates amounts to a judicial declaration that the only nomination method that satisfies the First Amendment is a primary or its functional equivalent – a result antithetical to *White* and this nation's rich history of political conventions. *See supra* Section I. Moreover, such a requirement would defeat the intention of New York's legislature, which crafted a system where party representatives are delegated the authority to vote for *multiple* judicial candidates, not conscripted to vote for just one.

In bending the *Storer* test to fit the unintended context of intraparty competition, the Second Circuit would change the meaning of *Storer* entirely. At most, *Storer* stands for the proposition that reasonably diligent candidates should be given an opportunity to enter the race, not that the rules should be adjusted to improve their odds of winning. Here, where there is no candidate ballot at the nominating stage precisely because there is a convention system in lieu of a primary, the proper equivalent to ballot access is *convention access*, *i.e.*, having a chance to put one's name up for consideration at the convention. To the extent this Court's ballot access decisions, including *Rhodes*, *Storer* and *Lubin*, offer any insight into the constitutionality of the inner-workings of intraparty competition, the principle that they espouse is

merely the right to compete, not the right to win. In every one of those cases, the minor party or independent candidates were clamoring for a position on the general election ballot even though they had no realistic chance of winning the election. By excluding those candidates from the general election ballot, those candidates were denied any opportunity even to be *considered* for election to office. These cases do not remotely support the notion that "disfavored major-party candidates," (App. 60), have a constitutional right to appeal the determination of party representatives by going directly to rank and file members. Indeed, as this Court has recognized in *Clements v. Fashing*, there is no fundamental right to be a candidate in the first place. 457 U.S. 957, 963 (1982) ("Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny'") (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

To the extent this Court's ballot access cases apply to intraparty competition, this Court should grant *certiorari* to settle the appropriate application of the *Storer* test for purposes of determining the scope of the First Amendment right due to voters and candidates in the nomination process.

III. THE SECOND CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH TWO OTHER CIRCUITS OVER THE APPROPRIATE CONSTITUTIONAL STANDARD FOR REVIEWING POLITICAL PARTY RULES GOVERNING THE SELECTION OF CONVENTION DELEGATES

This Court should grant *certiorari* to resolve the split between the Second Circuit, on the one hand, and the D.C. Circuit and the Fourth Circuit, on the other hand, concerning the proper constitutional test for reviewing the constitutionality of party rules governing the selection of judicial convention delegates. In *Ripon* and *Bachur*, the D.C. and Fourth Circuits weighed the competing First Amendment rights of political parties versus those of voters and candidates. *Both* decisions were based upon a

critical jurisprudential principle, namely, that the competing First Amendment rights of voters and political parties are each deserving of the same heightened level of constitutional protection. *Both* cases ultimately employed a rational basis balancing test for determining the constitutionality of the challenged rule. By contrast, the Second Circuit elevated the First Amendment rights of voters above that of political parties, and, instead of balancing these competing rights, evaluated the burdens imposed on voters and candidates in isolation from the rights of political parties. Thus, as shown more fully below, there is a conflict between the Second Circuit and that of two other circuits concerning the appropriate test to apply in evaluating conflicting, but co-equal First Amendment rights.

In *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), registered Republicans in numerous states challenged the constitutionality of the delegate allocation formula adopted by the National Republican Party for its 1976 convention as violating the principle of "one-man, one-vote." *Id.* Although the court upheld the constitutionality of the formula primarily on equal protection grounds, the court also found that "[t]o the extent that voting rights are involved, warranting close judicial scrutiny, these rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did." *Id.* at 588. While the *Ripon* court acknowledged that the right to vote is implicated in the nomination process, it held the "view that, as between that right and the right of free political association, the latter is more in need of protection in this case . . . the right to organize a party in the way that will make it the most effective political organization seems clearly at stake here." *Id.* at 586. Ultimately, the court applied what was effectively a rational basis balancing test, as it concluded that there was no equal protection problem because "the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *Id.* at 586-587 (emphasis added).

The *Ripon* court's approach hinged on its guiding principle that competing First Amendment rights of voters

and political parties were each deserving of the same level of constitutional protection. In reasoning by analogy to this Court's decision in another context, the court determined that the rights of voters must not come at "the price of interference" with the rights of political parties. The court explained that where the "two conflicting constitutional rights" of voters and political parties are at stake, voting rights are not entitled to heightened protection by the state or government as they might otherwise be in the absence of the countervailing rights of political parties. *Id.* at 586 n. 61 (citations omitted). Balancing the party's First Amendment rights against the voters' rights, the circuit court upheld the constitutionality of the party's rule governing delegate selection as related to a rational purpose.

In another case applying *Ripon's* rational basis review to a First Amendment challenge to an intraparty contest, the D.C. Circuit held that the strict scrutiny test developed for access to the general election ballot in the *Storer* line of cases – the test applied by the Second Circuit in this case – does not apply when a putative candidate's or voter's First Amendment rights are pitted against a political party's First Amendment rights. *See LaRouche v. Fowler*, 152 F.3d 974, 994-995 (D.C. Cir. 1998). When asserted First Amendment interests conflict, applying rational basis review rather than strict scrutiny "best effectuates the Supreme Court's direction to approach judicial intervention in this area 'with great caution and restraint,' and to recognize 'the large public interest in allowing the political processes to function free from judicial supervision.'" *Id.* at 995-996 (quoting *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972)). Indeed, in *LaRouche* the D.C. Circuit rejected a challenger candidate's First Amendment challenge even though the party completely excluded delegates supporting the candidate from the nominating convention. *Id.* at 996-998.

The *Ripon* court's balancing of the competing rights was also conducted from the perspective that the "internal workings of a political party" deserve the protection of the First Amendment absent invidious discrimination. *Id.* at 588. Indeed, the court recognized that "[t]here are a number of respects, then, in which the parties conduct

their affairs other than by giving equal attention to the preferences of all voters, or even all party adherents." *Id.* at 584 (footnote omitted). The court further noted that, in other Western democracies, "[t]he types of local leaders dominating the process vary from party to party and from locality to locality. . . . Candidate selection is not the business of the party rank and file. . . . Candidate selection is meant to be oligarchical." *Id.* at 585, n. 57 (citation and internal quotation marks omitted).

When the Fourth Circuit was presented with a situation involving the competing First Amendment rights of political parties and voters and candidates, it employed a similar balancing test to the one used in *Ripon*. In *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987), the appellee challenged the constitutionality of his party's rule requiring him to allocate evenly on the basis of gender his votes for delegates to the party's closed national Presidential convention. In finding no violation of the appellee's First Amendment right to vote, the Fourth Circuit – as had the *Ripon* court – began with the rights of political parties as the starting point of its analysis, noting that it had been settled by the Supreme Court in *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975), that "a political party has a right of political association protected by the First and Fourteenth Amendments, and that right of association carries with it a right to determine the party's own criteria for selection of delegates to its national convention." *Bachur*, 836 F.2d at 841. Indeed, the court even recognized that in exercising its right to associate, a party could choose to adopt a closed, delegate-based convention system, as has New York's legislature, in which voters have "no direct voice" and their preference may only be "partially translated into the actual nomination" as "popular" support may not be "wholly determinative of the outcome":

> standing between the individual voter and the eventual nomination of a candidate may be numerous party rules and procedures so that the will of the majority of the electorate expressing a

> . . . preference[,] and the selection of delegates[,] may be only partially translated into the actual nomination. A finding that . . . a right to participate in a popular primary election does not foreclose party limits on the effective weight of [that] participation, or mandate that the popular ballot is to be wholly determinative of the outcome of the nomination process. Indeed in many states, delegates to the national convention are selected by means other than a primary election, so that many . . . [voters] have no direct voice in the selection of delegates.

836 F.2d at 842 (emphasis added). Ultimately, the court concluded that "the limited restriction [placed] on Bachur's right to vote for delegates" did not unconstitutionally infringe upon his right to vote when "balanced" against the "broad, encompassing" First Amendment rights of parties. *Id.* at 842. Critical to its decision was the fact that the party rule at issue governing delegate selection "manifestly has a rational purpose," notably to promote female participation in party affairs. *Id.* at 842. In doing so, the Fourth Circuit recognized that the constitutionality of the representational scheme in *Ripon* was upheld because it "rationally advance[d] some legitimate interest of the party. . . . " *Id.* at 842 (citing and quoting *Ripon*, 525 F.2d at 586-587).

The Second Circuit adopted a fundamentally different approach than that of the D.C. Circuit and the Fourth Circuit. Instead of using a rational basis balancing test, the Second Circuit analyzed the burdens associated with the convention system by applying the *Anderson v. Celebrezze* test in a one-sided fashion without regard for a party's First Amendment right to choose its standard bearer. *See* App. 34-35, 45-46. The starting – and effectively ending – point for the Second Circuit's analysis was the purported burdens imposed on the First Amendment rights of voters and candidates. Only after determining that the burdens imposed on voters and candidates by the convention were "severe," did the Second Circuit ever even give a nod to the formidable constitutional rights of

parties. *See* App. 49-54. But, even then, the court's consideration of party rights was limited to applying strict scrutiny analysis, which requires that a challenged law be necessary to serve a compelling state interest. *See* App. 49-54, 70. While the Second Circuit claimed that it considered the First Amendment rights of political parties by balancing or weighing them directly against the rights of voters and candidates, (*see* App. 49-53), in reality, the Second Circuit merely paid lip service to party rights in analyzing whether they "justify New York's nominating scheme" under strict scrutiny analysis (*see* App. 49, 70). Within this context, the First Amendment rights of political parties were improperly subordinated to those of voters and candidates, notwithstanding the decisions in *Ripon* and *Bachur*.

Unsurprisingly, the convention system had no chance of ever surviving the Second Circuit's strict scrutiny analysis, and thus was struck down as unconstitutional. By contrast, the constitutionality of the convention system should have been upheld had the Second Circuit not favored the First Amendment rights of voters over those of political parties, and instead had followed the constitutional standard under *Ripon* and *Bachur*.

Thus, there exists a direct conflict between the Second Circuit's decision and that of two of its sister circuits over the appropriate constitutional standard or test to employ where a situation involves conflicting First Amendment rights. This petition should be granted so that this Court can resolve this split and its far reaching implications.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

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No. 06-766

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al*.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTIONS PRESENTED

1. Whether a state election scheme that imposes severe burdens on voters and potential candidates is nevertheless exempt from strict constitutional scrutiny because one of its elements is a nominating convention.

2. Whether it was an abuse of discretion to enter a preliminary injunction temporarily precluding use of the state's unconstitutional election scheme until the case is tried on the merits or until the state legislature enacts a constitutional system.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

1. The Facts Adduced At The Preliminary Injunction Hearing 2

   a. Recruiting and Qualifying Delegates 4

   b. Electing Delegates 6

   c. "Lobbying" the Party Leaders' Chosen Delegates 8

   d. The General Election 11

2. The Preliminary Injunction 11

3. The Interlocutory Appeal 12

REASONS FOR DENYING THE WRIT 15

I. THE NOMINATION SCHEME IN THIS CASE IS UNIQUE, AND THE SECOND CIRCUIT'S DECISION IS FACT-BOUND. 16

II. THE CASE IS PROCEDURALLY UNSUITABLE FOR REVIEW. 17

III. THE SECOND CIRCUIT CORRECTLY APPLIED *STORER V. BROWN* AND SIMILAR BALLOT ACCESS CASES. 18

   A. The Unitary Standard Governing Ballot Access Cases Applies To Intra-Party Nomination Processes. 18

   B. The Second Circuit's Decision Does Not "Collide" With Storer 22

IV. THE SECOND CIRCUIT'S DECISION DOES NOT "CLASH" WITH *WHITE* 24

V. THERE IS NO CIRCUIT SPLIT. 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

American Party of Texas v. White, 415 U.S. 767 (1974) 14, 20, 21, 24, 25

Anderson v. Celebrezze, 460 U.S. 780 (1983) 21

Bachur v. Democratic National Party, 836 F.2d 837 (4th Cir. 1987) 27

Bowe v. Board of Election Commissioners, 614 F.2d 1147 (7th Cir. 1980) 22

Bullock v. Carter, 405 U.S. 134 (1972) 20, 24

Campbell v. Bysiewicz, 242 F. Supp. 2d 164 (D. Conn. 2003) 22

Clingman v. Beaver, 544 U.S. 581 (2005) 21, 23, 24

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) 17

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 19

Kusper v. Pontikes, 414 U.S. 51 (1973) 20, 24

Lubin v. Panish, 415 U.S. 709 (1974) 20, 21

Molinari v. Powers, 82 F. Supp. 2d 57 (E.D.N.Y. 2000) 22

Moore v. Ogilvie, 394 U.S. 814 (1969) 19, 20

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) 26

Norman v. Reed, 502 U.S. 279 (1992) 22

Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) 27, 28

Smith v. Allwright, 321 U.S. 649 (1944) 19

Storer v. Brown, 415 U.S. 724 (1974) 14, 18, 20, 21

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 21, 23

Terry v. Adams, 345 U.S. 461 (1953) 19

Texas v. Mead, 465 U.S. 1041 (1984) 17

Ulrich v. Mane, 383 F. Supp. 2d 405 (E.D.N.Y. 2005) 22

United States v. Classic, 313 U.S. 299 (1941) 19, 24

United States v. Johnston, 268 U.S. 220 (1925) 17

Vasquez v. United States, 454 U.S. 975 (1981) 16

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 17

Williams v. Rhodes, 393 U.S. 23 (1968) 19, 21

CONSTITUTIONAL PROVISIONS & STATUTES

N.Y. Const. art. VI, § 6(c) 1

N.Y. Elec. Law § 6-108 26

N.Y. Elec. Law § 6-110 26

N.Y. Elec. Law § 6-124 ..... 8, 26

N.Y. Elec. Law § 6-126 26

N.Y. Elec. Law § 6-136(2)(i) 5

N.Y. Elec. Law § 6-136(3) 5

N.Y. Elec. Law § 6-158 26

N.Y. Elec. Law § 6-160(2) 7

N.Y. Elec. Law § 6-202 26

N.Y. Elec. Law § 15-108 26

MISCELLANEOUS

John Caher, *Spitzer Calls for Court and Election Reforms*, N.Y. L.J. 1 (Jan. 4, 2007) 18

Eliot Spitzer, Address to the Rockefeller Institute of Government: Government Reform (Nov. 21, 2006) 15, 17-18

STATEMENT

New York's constitution grants voters the authority to elect Supreme Court Justices (the state's trial judges of general jurisdiction). N.Y. Const. art. VI, § 6(c). By statute, New York mandates a "three-part scheme that combines a primary election, a nominating convention, and a general election." Pet. App. 10a (footnote omitted). The lower courts found that this scheme—enacted when Tammany Hall ran the New York Legislature—imposes severe burdens on voters and candidates. Local party leaders always hand-pick the nominees; voters have no realistic opportunity to influence their party's nomination; and insurgent candidates have no real opportunity to compete for the nomination. Moreover, because most parts of the State are dominated by a single party, these undemocratic nominations dictate the outcome of the general election in all but a few instances. As the Second Circuit put it, "New York has transformed a de jure election into a de facto appointment." *Id.* at 69a-70a.

As we show *infra*, several compelling reasons counsel against review of the Second Circuit's decision upholding a preliminary injunction that enjoined this scheme until trial. The case remains at an interlocutory stage. The district court "expressly contemplated a full trial at a later date," *id.* at 77a, and Petitioners "hotly contest" the relevant facts, Pet. 9. Events are also moving fast. It is likely that the state Legislature will replace the laws at issue before this Court could complete consideration of the case on the merits. Moreover, the issues presented—far from being matters of broad importance—concern an election system that is "unique in the nation." Pet. App. 9a. Finally, on the merits, the Petition relies on a caricature of the Second Circuit's opinion. No fair reading can support the Petition's hyperbolic arguments about clashes with this Court's precedents and conflicts with other circuits. Rather, the opinion faithfully applies the legal standards laid out by this Court and

carefully explains why the facts of this case are radically different from the facts at issue in the D.C. Circuit and Fourth Circuit cases cited by Petitioners.

1. The Facts Adduced at the Preliminary Injunction Hearing

The Petition discusses the statutory scheme as an abstraction. But the district court developed a 10,000-page preliminary injunction record establishing how the scheme actually functions, and the Second Circuit relied on the district court's extensive findings.

As the court of appeals put it: "This case requires us to peer inside New York's political clubhouses and determine whether party leaders have arrogated to themselves a choice that belongs to the people." *Id.* at 5a. The Second Circuit described a system "beset with obstacles" that "deprives a candidate of access altogether" through "overlapping and severe burdens." *Id.* at 17a, 45a. "[T]he evidence showed that a network of restrictive regulations effectively *excludes* qualified candidates and voters from participating in the primary election and subsequent convention . . . ." *Id.* at 53a. In much of New York, the judicial nominating conventions operate in the manner of a proverbial "'smoke-filled room.'" *Id.* at 149a n.36. Absent a massive split within the party's leadership, not a single Democratic or Republican insurgent candidate has ever won nomination under this system. *Id.* at 58a, 147a, 167a. As the district court found:

> [L]ocal major party leaders—not the voters or the delegates to the judicial nominating conventions—control who becomes a Supreme Court Justice and when. The highly unusual processes by which that extremely important office is filled perpetuate that control, and deprive the voters of any meaningful role.

Id. at 95a.

At the preliminary injunction hearing, the district court received extensive evidence that local political party leaders control the election process. One report in evidence, authored by a Commission that included ten sitting or former New York judges, states: "'the uncontested evidence before [the Commission] is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders.'" *Id.* at 29a. As the court of appeals observed,

> The Commission is hardly the only entity to reach this conclusion—it merely is the latest. Since 1944, New York's judicial nominating system has been described as exclusionary and boss-dominated; reports and newspaper editorials from that time forward have decried an electoral practice "that mocks choice," and criticized a system in which "voters can never know the candidates and have to accept party slates," while the "real choice is . . . left to political bosses . . . who control nominations."

Id.

Defendants' own witnesses confirmed this finding. For example:

- Defense expert Hechter wrote: "'The consequences of the New York judicial convention are well-appreciated. In politically unified districts it is difficult to attain the nomination without the support of the party leadership. *This high barrier to entry significantly narrows the pool of candidates.*'" *Id.* at 177a n.40 (emphasis added by the district court).

- Defense expert Kellner admitted that any attempt by a insurgent candidate to elect supportive convention delegates would "twist[] the design of the system on its head": "'The system isn't designed for individual candidates to be campaigning directly among the voters.'"

Id. at 168a-69a. He added: "'By definition, the convention system is designed [so] that the political leadership of the party is going to designate the party's candidates.'" *Id.* at 19a.

- New York County Democratic Party leader Farrell, the executive officer of one of the defendants, acknowledged his power to stop *any* candidate whom he had not approved: "'I can surely block you.'" *Id.* at 133a. Defense witness Schiff confirmed: "I think I would know about it" if someone were nominated over Mr. Farrell's objection, and "I can't remember it ever happening that way." Tr. 1291-92; Pet. App. 21a.

These admissions confirmed a wealth of detailed evidence about each step in New York's byzantine statutory nomination system.

a. Recruiting and Qualifying Delegates. New York's Supreme Court Justice elections ostensibly begin with a primary. Voters elect delegates to separate judicial nominating conventions in each of New York's 12 Judicial Districts. Within each Judicial District, candidates for the office of "judicial delegate" run in each of the much smaller Assembly Districts ("ADs"). As the district court put it:

> This odd feature of the judicial nominating convention process contributes significantly to the heavy burden it places on those who seek major party nominations for Supreme Court Justice without the support of the party's district leaders and county leaders. Such candidates face the prospect of as many delegate races as there are ADs in the judicial district—at least nine and as many as 24.

Id. at 104a. Adding to this burden, the political parties, which are authorized by statute to set the number of delegates, require the election of multiple delegates in each AD, amounting to

scores of candidates in each Judicial District. *Id.* at 11a-12a, 104a-07a.

Therefore, the first problem any insurgent faces is recruiting enough candidates to contest scores of delegate and alternate races in each of the district's many ADs. That problem is insuperable in practice, as all but one of Petitioners conceded at the preliminary injunction stage. *Id.* at 168a. Indeed, Petitioners' expert testified that it would be *improper* for a candidate to run a slate of delegates, because "[t]he system is designed for candidates to be appealing to the judicial delegates and not to the electorate at large." Tr. 1573.

Even if a candidate could recruit enough people willing to run for delegate and alternate, it would be practically impossible to put all those willing individuals on the ballot. For each prospective delegate or alternate candidate, the candidate would have to gather 500 valid signatures of party members residing in the specific AD. N.Y. Elec. Law § 6-136(2)(i), (3). As a result, the number of signatures required just to run a slate of delegates and alternates across a single Judicial District is several times larger than the number required to get onto the primary ballot for other judicial and non-judicial offices covering the same territory and rivals the number required to run for Governor *statewide*. Moreover, that comparison ignores the added statutory burden of obtaining signatures in *each* of the ADs in the Judicial District. Pet. App. 12a. In addition, to protect against legal challenges by the county's party machine, an insurgent candidate would need to gather many more than the statutory minimum of 500 signatures in each AD. *Id.* at 13a, 108a.

Those few candidates who have tried to run alternate slates of delegates have not come close to success. For example, one City Court Judge in Rochester "found that recruiting and running slates of delegates was 'not a realistic option.'" *Id.* at 14a. Competing would have required him to recruit more than 55

candidates for delegate. *Id.* Moreover, "the signature requirements were daunting: he would have had to recruit 'several dozen people to work full-time at gathering' at least 9,000 signatures over the course of 37 days." *Id.* The candidate concluded that "'there was simply no way [he] could overcome these organizational and financial burdens.'" *Id.* at 15a.

Judge Margarita López Torres, one of the plaintiffs, tried to obtain the nomination of her party for eight years. She "was an experienced and successful campaigner who twice won countywide election to the Civil Court in Brooklyn." *Id.* But she, too, found that the "'burdens and barriers to organizing such [delegate] campaigns are truly insurmountable' for those candidates who lack the 'county party leaders' backing." *Id.*

By contrast, party leaders easily tap party loyalists to run as delegates and alternates. "Most delegates have strong ties to the district leaders who select them, and sometimes work for them as well." *Id.* at 114a. As defense expert Hechter admitted, "'District leaders effectively select delegates to the judicial convention.'" *Id.* at 177a n.40. Defense expert Kellner agreed that local politicians select judicial delegates "at a meeting where I'm reminded of the old song, politics and poker from Fiorello, where they're sitting around the table, say who do we run?" Tr. 1624. Moreover, those leaders have no difficulty putting their hand-picked choices onto the ballot in every AD. An enormous hurdle for a challenger is a *pro forma* exercise for the party leaders, who "can easily mobilize the resources necessary to conduct the petition drives throughout the judicial districts because they are collecting signatures in all of those ADs anyway, for a variety of other party and public offices." Pet. App. 109a; *see also id.* at 16a-17a.

b. Electing Delegates. Delegates run for the sole purpose of attending a single judicial convention. Two weeks after the election, the job is over. If, as occurs almost all the time, the party leadership slates of delegates and alternates are the

only ones filed with the Board of Elections, they are "deemed . . . elected" and do not even appear on the September ballot at all. N.Y. Elec. Law § 6-160(2). "This kind of invisible, automatic 'election' is the norm rather than the exception." Pet. App. 17a.[1]

Even in the rare contested delegate and alternate races, the September ballot does not and cannot tell voters which Supreme Court candidate the nominees intend to support—in contrast with the ballot in Presidential primaries, which shows the voter both the delegate and the Presidential candidate together. As a result, an insurgent candidate would have to inform the voters of a particular delegate's or slate's allegiance through expensive campaign advertising or contacts with voters—with each AD requiring separate literature identifying the relevant delegate candidates and the Supreme Court candidate. *Id.* at 13a.

A candidate who recruited enough nominees for all the delegate and alternate seats in every AD, *and* obtained the necessary signatures, *and* survived legal challenges to their petitions, would *still* face the formidable obstacle of actually getting the insurgent slate elected. A candidate

> would need to field delegates in all or virtually all the ADs to have a realistic chance of prevailing in enough races to obtain a majority of delegate support at the convention. This is true not only because a challenger candidate is not likely to win every delegate race under normal circumstances, but also because the prospect of competing against the party leaders elevates the degree of difficulty.

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[1] The rare exceptions "are almost always the result of localized disputes between entrenched factions of the party, not of challenger candidates' efforts to obtain support of party members." Pet. App. 112a.

Pet. App. 107a; *see also id.* at 63a.

c. "Lobbying" the Party Leaders' Chosen Delegates. Insurgents have the theoretical option of "lobbying" the convention delegates. But once the delegates have been duly installed in early September, New York law requires the nominating convention to be held within two weeks. N.Y. Elec. Law § 6-124. That is an impossibly short period in which to persuade scores of delegates to defy the leaders who gave them their positions. Pet. App. 18a, 116a. But even if it were two months, or two years, party leaders' control over the delegates and the convention would thwart any insurgent.

New York's judicial nominating conventions are *pro forma* affairs at which the delegates "rubber stamp" decisions made earlier. *Id.* at 22a-23a, 114a, 125a-26a. Petitioners' expert admitted: "'Party leaders have great influence over the nomination process when their party is unified. Indeed, judicial conventions generally take little time. Decisions are often unanimous. Since insurgent candidates are only likely to be nominated when the party is internally divided, rates of incumbency are high.'" *Id.* at 177a n.40. Defense expert Kellner "conceded that at least in some judicial districts, the 'leadership of the party . . . hold[s] a meeting before the convention' to 'work things out,' and then makes nomination 'recommendations' to the delegates. Asked whether those 'recommendations' were 'always followed,' Kellner replied, 'Generally, yes.'" *Id.* at 21a.

The district court credited "in its entirety" the testimony of plaintiffs' expert Henry Berger. *Id.* at 117a. Mr. Berger, former Chairman of New York's Commission on Judicial Conduct, explained:

> "[T]he district leaders almost always follow the wishes of the county party [leader] when it comes to voting for Supreme Court candidates at the convention. In turn, the delegates follow the wishes of the district leaders who

> have selected them and support the county party [leader's] chosen candidates."

Id. at 19a. Mr. Berger also testified that "the pool of truly eligible candidates is severely limited and cannot include many talented lawyers who have spent their careers focusing on legal work rather than political party service." JA-296.

Expert Bruce Cain testified that "[t]he whole process lacks that democratic moment [in] which the voters get to say whether or not they believe the party's organization is doing the right thing. It is just not there in the process." Tr. 329. The district court credited Dr. Cain's conclusion, finding "no evidence of a single successful challenge to candidates backed by the party leaders." Pet. App. 131a-32a.

Compelling documentary evidence confirmed the experts' conclusions. More than 96% of nominations have been uncontested at the convention. *Id.* at 22a. The district court also credited evidence of the compressed time devoted to the conventions, *see id.* at 126a-29a, and the high absentee rates for judicial delegates, which range from 25% for Democratic Party conventions in New York City to 69% for Republican Party conventions in New York City, *see id.* at 23a, 104a n.8. The district court explained that "[t]he extremely high absentee rate reflects, among other things, the fact that delegates to the conventions know their votes do not really matter." *Id.* at 125a.

The futility of "lobbying" is well illustrated by the experience of Judge López Torres. As the district court explained: "Shortly after she was elected [to the Civil Court]...she was told by [Clarence] Norman, the county leader, and Vito Lopez, her district leader, to hire a particular young attorney as her court attorney.[2]... When López Torres refused, Norman told

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[2] The "court attorney," or "law secretary," is the state-court analog to a federal judge's law clerk. Pet. App. 24a.

her she would not become a Supreme Court Justice." *Id.* at 137a-38a; *see also id.* at 24a-25a. Mr. Lopez later offered Judge López Torres "a chance to redeem herself: if she hired his daughter as her law secretary, he would secure her nomination as the Democratic Party's candidate for Supreme Court Justice." *Id.* at 25a. Again, she refused. When Mr. Norman later blocked Judge López Torres from obtaining the nomination, he said that "his concerns with her candidacy had nothing to do with her qualifications," but rather arose out of her "disloyalty." *Id.* at 140a, 27a.

State Senator (and witness for the defense) Martin Connor acted as chair of the 2002 nominating convention in Brooklyn. He admitted that a "County" operative routinely told him in advance who the nominees were to be. Tr. 2204, 2208-09. Consistent with that routine, on the day before the 2002 convention, he learned that the party leaders had chosen a candidate he considered unqualified. "I said you have Margarita López Torres, she might put her name in. You people are supporting . . . a horrible choice." *Id.* at 2208-09; *see also* Pet. App. 22a, 114a-15a. Despite his personal outrage and conviction that "what was about to be done was wrong, and bad for the bench," Senator Connor kept quiet at the convention. *Id.* at 115a.

Similarly, after the 2003 convention a year later, a "County" operative circulated a letter to all delegates telling them that he had voted against Judge López Torres at the convention because she was an "ingrate" for refusing to hire Vito Lopez's daughter. *Id.* at 28a, 142a.

If a powerful and respected politician like Senator Connor felt obliged to keep quiet while "County" punished Judge López Torres, "it is hardly likely that mere delegates will refuse to do the county leader's bidding in the ordinary course of events." *Id.* at 115a. The district court recognized this as evidence of the "political dynamic [that] ensures that the district

leaders and their delegates . . . virtually always support the candidates backed by the party leaders." *Id.* at 114a.

d. The General Election. "Empirical evidence showed that because one-party rule is the norm in most judicial districts, the general election is little more than ceremony." *Id.* at 23a. Even Petitioners' expert admitted that "there are relatively few judicial districts where there are contested general elections." Tr. 1601.

2. The Preliminary Injunction

Following a four-week evidentiary hearing on Plaintiffs' motion for a preliminary injunction, the district court concluded that Plaintiffs had "made a compelling showing that the New York system is designed to freeze the political status quo," Pet. App. 183a, had shown a substantial likelihood of success on the merits, *id.* at 185a, and had met the other requirements for a preliminary injunction.

In fashioning its preliminary injunction, the district court noted that "[t]he choice of a permanent remedy for this constitutional violation does not fall to me, but rather to the legislature of New York State." *Id.* at 183a. The court therefore awarded a temporary remedy, lasting only until trial, or until the legislature enacts a constitutional method of nominating Supreme Court Justices. *Id.* The court severed the unconstitutional system and left in place the default statutory framework that otherwise governs all judicial and non-judicial elections in New York. The court determined that this approach, which would result in a direct primary election under New York's default provision (N.Y. Elec. L. § 6-110) until the State enacts a constitutional statute, was "the least intrusive course." Pet. App. 184a. Defendants never proposed to the district court *any* alternate remedy.

3. The Interlocutory Appeal

A unanimous panel of the Second Circuit affirmed. The court conducted a thorough review of the facts found by the district court after the preliminary injunction hearing, approving them entirely. The court began its legal analysis by recognizing that the right to vote is "'of the most fundamental significance,'" that "'the rights of voters and the rights of candidates do not lend themselves to neat separation,'" and that "'[o]ur primary concern is with the tendency of ballot access restrictions to limit the field of candidates from which voters might choose.'" *Id.* at 35a (following and quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983), and *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

At the same time, the Second Circuit recognized that "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Id.* (quoting *Anderson*, 460 U.S. at 788). Thus, the court refused to "resort to any 'litmus-paper test that will separate valid from invalid restrictions,'" and explained that "our review is neither formalistic nor abstract. Instead, we must turn a keen eye on how the electoral scheme functions in fact; indeed, 'it is essential to examine in a realistic light the extent and nature of [the scheme's] impact on voters.'" *Id.* at 35a-36a (quoting, respectively, *Anderson*, 460 U.S. at 789, and *Bullock v. Carter*, 405 U.S. 134 (1972)).

The court of appeals then articulated this Court's flexible standard for assessing ballot access restrictions:

> If our realistic assessment yields the conclusion that the electoral scheme lightly or even moderately burdens First Amendment rights, we apply a relaxed standard of review, according to which the restrictions generally are valid so long as they further an important state interest.

> On the other hand, if we conclude that a law imposes severe burdens, we apply strict scrutiny, which requires that the law be necessary to serve a compelling state interest.

Id. at 36a (following *Bullock*).

Next, the Second Circuit explained that "the state must protect First Amendment rights at each 'integral part of the procedure of choice.'" *Id.* at 38a (quoting *United States v. Classic*, 313 U.S. 299, 318 (1941)). It rejected Petitioners' contention that *Classic* and its progeny apply "only where the state has provided for a *direct* primary, whereas New York has opted for an *indirect* delegate primary election followed by a convention." *Id.* at 39a. "This variation in the process of public choice," the court held, "does not release the State from its First Amendment obligations." *Id.*

The court of appeals then explained that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest," and that "exclusions that result from a complex of otherwise facially valid regulations also may offend the First Amendment." *Id.* at 41a-42a. The court added: "Although no case has passed on a scheme identical to New York's unique judicial election process, the above principles derive directly from a line of Supreme Court cases." *Id.* at 42a; *see also id.* at 42a-44a (following *Anderson*, 460 U.S. 780; *Am. Party of Tex. v. White*, 415 U.S. 767 (1974); *Bullock*, 405 U.S. 134; *Jenness v. Fortson*, 403 U.S. 431 (1971); and *Williams*, 393 U.S. 23)).

Petitioners attempted to avoid strict scrutiny on two grounds. *First*, they took issue with the district court's findings of fact. The Second Circuit, however, embraced those findings. *Id.* at 10a. The question whether the burden was "severe" was not close: the New York scheme "does not merely deprive a

candidate of a realistic chance to prevail; rather, through the use of overlapping and severe burdens, it deprives a candidate of access altogether." *Id.* at 45a. The court assessed these burdens in light of the extensive record developed below, *id.* at 61a-70a, including statistical, documentary, and testimonial evidence from many witnesses in addition to that of the lead plaintiff—a qualified and diligent candidate whom many voters within her party wished to support: "when López Torres was an incumbent Democratic office holder seeking a Supreme Court nomination, she had significant public support, but could not access the electoral process without possessing either great wealth or a massively preexisting political apparatus." *Id.* at 59a. Petitioners attacked this facet of the court's fact-based inquiry as lacking legal support. But the Second Circuit easily rejected that complaint, relying on *Storer v. Brown*, 415 U.S. 724 (1974), as well as its own precedent. Pet. App. 60a. It found the distinction between the independent candidate in *Storer* and the challenger candidate here to be immaterial, because "[m]inor party candidates and disfavored major-party candidates face closely similar challenges in this context: both are opposing an entrenched, dominant, and hostile political apparatus." Pet. App. 60a.

Second, Petitioners argued that "a nominating convention is per se constitutional," *id.* at 46a, relying for this novel argument on a snippet from this Court's decision in *American Party of Texas v. White*, 415 U.S. 767 (1974). The Second Circuit rejected that interpretation of *White* for several reasons, including the fact that this Court actually applied strict scrutiny to the statute there at issue. Pet. App. 47a-48a. The court of appeals also deemed inapposite two cases cited by Petitioners that involved challenges to internal party rules relating to the presidential convention system, because those rules imposed minimal burdens on the franchise and were not mandated by law. *Id.* at 49a-54a.

The Second Circuit then considered and rejected as insufficient each of the State's proffered justifications for the burdens imposed by its election system, applying strict scrutiny. *Id.* at 70a-76a. Petitioners have not taken issue with that aspect of the ruling below. Finally, the Second Circuit found no abuse of discretion in the district court's temporary remedy. *Id.* at 78a-84a.

REASONS FOR DENYING THE WRIT

Petitioners attempt to portray the Second Circuit's application of this Court's precedents to New York's unique statutory scheme as a rogue decision that will have broad implications for constitutional doctrine and for other state statutes. In truth, however, the fact-bound ruling of the court of appeals addresses a statutory scheme that has no analog anywhere in the country. Any decision by this Court in this case would thus have no direct application to *any* other state's election laws.

Moreover, other factors make this case procedurally unsuitable for review. The Petition seeks review of an interlocutory order, even though the lower court "expressly contemplated" a later trial. *Id.* at 77a. Petitioners also disregard the New York Legislature's express commitment to address "expeditiously" the constitutional infirmities identified by the lower courts. *Id.* at 84a. The State's new Governor pledged during his recent campaign to reform what he called "a party-dominated system of judicial selection that permits unqualified judges to reach the bench." Eliot Spitzer, Address to the Rockefeller Institute of Government: Government Reform (Nov. 21, 2006). Accordingly, it is very likely that the statutory scheme at issue will be changed even before this Court could reach the merits.

Nor is there any reason to doubt the validity of the Second Circuit's legal analysis. Far from running afoul of this Court's opinions in *Storer* or *White*, the court faithfully applied those precedents—and the closely related cases that Petitioners do not

mention. Moreover, in part because New York's statutory scheme is unique, the suggestion that the decision conflicts with rulings of two other circuits—involving internal party rules rather than mandatory statutes, and burdens that were anything but severe—does not withstand scrutiny.

I. THE NOMINATION SCHEME IN THIS CASE IS UNIQUE, AND THE SECOND CIRCUIT'S DECISION IS FACT-BOUND.

A decision by this Court would be relevant only to New York's "unique hybrid scheme" for nominating Supreme Court justices. *Id.* at 47a. Of the 33 states that use contestable elections to select some or all of their trial judges, New York is the only state that uses a convention system at all, let alone the hybrid scheme at issue. *Id.* at 97a-98a. In addition, the scheme is unique to the office of Supreme Court Justice *within* New York. Candidates for every other elective office in New York—judicial and non-judicial—run in ordinary primary elections. *Id.* at 98a. The Petition identifies no electoral system elsewhere that would be even remotely affected by a ruling on the merits. Indeed, Petitioners' failure to identify any real conflict between the Second Circuit's decision and either this Court's or other circuits' precedents owes to the indisputable fact that New York's arcane system has no analog in the current statutory nomination systems in other states.

For the same reason, this case would be a peculiarly inappropriate vehicle to address any broader questions of First Amendment doctrine. In general, this Court will "decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases." *Vasquez v. United States*, 454 U.S. 975, 977 (1981).

The Second Circuit's decision turned on an analysis of New York law and evidence of the severe burdens it imposes on candidates and voters. Pet. App. 5a, 95a. Although Petitioners

"hotly contest" the facts, Pet. 9, they offer no reason why it would be a wise allocation of this Court's resources to umpire such a contest. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

II. THE CASE IS PROCEDURALLY UNSUITABLE FOR REVIEW.

Review by the Court at this juncture would be premature, as both the factual record for the lower courts' interlocutory decisions and the very statutory scheme at issue may change.

The district court adopted a "temporary remedy," and "expressly contemplated a full trial at a later date." Pet. App. 77a. For that reason alone, review by this Court would be premature at best. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of *certiorari*). As this Court has said, "except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

Moreover, the Legislature and the Governor have indicated that they intend to alter the statutes at issue. Within "weeks after the district court issued its decision, New York's State Senate passed a bill providing for primary elections for the office of Supreme Court Justice," Pet. App. 83a, and the Senate sponsor just reintroduced the same bill on January 4, 2007, S. 564. In a brief filed with the Second Circuit, the Legislature pledged to "'move as expeditiously as necessary to devise a workable solution'" in the event the Second Circuit affirmed. Pet. App. 84a. And the State's new Governor has stated: "It is a simple fact that our court system is in dire need of reform.... [T]he courts have been hopelessly compromised by a party-dominated system of judicial selection that permits unqualified judges to reach the bench." Eliot Spitzer, Address to the Rock-

efeller Institute of Government: Government Reform (Nov. 21, 2006). More recently, he said that "there must be a way to primary onto the ballot. I will not support anything that has a closed convention structure, where only those who came out of the convention could be on the ballot." John Caher, *Spitzer Calls for Court and Election Reforms*, N.Y. L.J. 1, 12 (Jan. 4, 2007).[3]

III. THE SECOND CIRCUIT CORRECTLY APPLIED *STORER V. BROWN* AND SIMILAR BALLOT ACCESS CASES.

Petitioners work hard to concoct a tension between the Second Circuit's decision and *Storer v. Brown*, 415 U.S. 724 (1974). But the Second Circuit's application of *Storer* to New York's hybrid convention system was entirely proper and unremarkable. The court of appeals simply used the standard articulated and applied by this Court to *all* ballot access cases for more than 40 years, and that test is perfectly adequate to guide the lower courts.

A. The Unitary Standard Governing Ballot Access Cases Applies To Intra-Party Nomination Processes.

Petitioners challenge the Second Circuit's reliance on "the *Storer* line of cases," insisting that those cases addressed only

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[3] Review by this Court is particularly inappropriate given that a full range of potential reforms is being publicly debated. The Legislature has recently held hearings across the State to address the future of the Supreme Court selection system. Not surprisingly, there is great variety in the remedies that have been proposed. The remedies proposed range from an appointive system, to primaries (as exist for every other election in New York), to major and minor changes to the convention system. Strikingly, the system as it existed prior to the district court's decision was almost universally criticized in the hearings for what the President of the New York State Bar Association called its "undemocratic" and "sham" (as well as "unconstitutional") form.

minor party or independent candidate access to general election ballots, rather than "intraparty competition" at the nomination phase. But the ballot access cases that undergird the Second Circuit's decision are part of a single line of cases in which this Court has applied a consistent approach to analyzing barriers to participation in the political process—strict scrutiny for "severe" burdens; rational-basis scrutiny for "lesser" burdens—whether at the nomination or general election stage, and irrespective of whether the plaintiffs are major-party, minor-party, or independent candidates.

Beginning with the White Primary Cases, this Court established the principle that the voters' "right of participation" is fully applicable at the intra-party nomination phase and must be "protected just as is the right to vote at the election." *United States v. Classic*, 313 U.S. 299, 318-19 (1941); *Smith v. Allwright*, 321 U.S. 649, 653 & n.6, 663-64 (1944) (Democratic Party primary); *Terry v. Adams*, 345 U.S. 461, 469-71 (1953) (pre-primary election by private club). In *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966), this Court relied on these cases in striking down a poll tax, explaining that any substantial infringement on the fundamental right to vote "must be carefully and meticulously scrutinized." (quotation marks omitted).

In *Williams v. Rhodes*, 393 U.S. 23 (1968), the Court struck down an Ohio law that "heavily burdened" the ability of new political parties to place electors on the presidential ballot. *Id.* at 31. Following *Harper*, and resting its decision on both the First and Fourteenth Amendments, the Court applied strict scrutiny to strike down the statute because the State "failed to show any 'compelling interest' which justified imposing such heavy burdens on the right to vote and to associate." *Id.*

In *Moore v. Ogilvie*, 394 U.S. 814 (1969), the Court used the same standard to evaluate an Illinois statute that burdened independent candidates. Following *Classic* and *Allwright*, the

Court applied strict scrutiny to severe burdens on the right to vote, expressly applying the same level of scrutiny as in cases of invidious discrimination: "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination *or of abridgment of the right to vote*." 394 U.S. at 818 (emphasis supplied).

In *Bullock v. Carter*, 405 U.S. 134 (1972), the Court struck down a Texas law that placed severe burdens on candidates in the Democratic Party primary election. The Court applied "close scrutiny" because the "patently exclusionary character" of the filing fee requirement "in every practical sense precluded" certain candidates "from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support." *Id.* at 143.

And in *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court applied the same standard to strike down an Illinois statutory restriction on voters' freedom to participate in their parties' nomination that "deprived [the voter] of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice." *Id.* at 58. The Court added: "As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest." *Id.*

Then, in three cases announced together on March 26, 1974—*Storer*, *Lubin v. Panish*, 415 U.S. 709 (1974), and *White*—the Court applied this same standard: severe burdens on the right to vote in any context require strict scrutiny, while lesser burdens permit rational-basis review. Each of the cases cited one or both of the others; all three cases cited and followed *Williams* and *Bullock*. In *Storer*, this Court applied the test to independent candidates, affirming some restrictions as both legitimate and compelling, 415 U.S. at 736, and remand-

ing for further consideration of the "extent of the burden" imposed by other restrictions, *id.* at 740. In *Lubin*, this Court applied the same test to strike down California's filing fees for all party candidates in that state's primary elections. *Lubin* found that the right to vote is "'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot." 415 U.S. at 716 (quoting *Williams*, 393 U.S. at 31). Finally, in *White*, the Court applied strict scrutiny to restrictions on the nominating procedures available to minor parties, holding that the restrictions' "validity depends upon whether they are necessary to further compelling state interests." 415 U.S. at 780 (citing *Storer*).

Petitioners thus are wrong to insist that *Storer* is part of a separate "strand" of jurisprudence. This Court has applied the identical First and Fourteenth Amendment standard to restrictions on independent or minor-party candidate access to the general election ballot (*e.g.*, *Storer*, *Williams*) and restrictions on intra-party nomination procedures for major and minor parties (*e.g.*, *White*, *Kusper*, *Bullock*, *Lubin*).[4] Later cases use the same test. *See Clingman v. Beaver*, 544 U.S. 581, 586-87, 589 (2005) (determining that burdens imposed by restrictions applicable to both major and minor parties during nomination phase were not severe); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-14, 216 & n.7 (1986) (applying strict scrutiny where state imposed severe burdens on major-party nominations); *Anderson v. Celebrezze*, 460 U.S. 780, 789-96 (1983)

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[4] Petitioners attempt in a footnote to cabin *Lubin* and *Bullock* as cases involving invidious discrimination decided on Fourteenth Amendment grounds. Pet. 19 n.2. But these cases did not address discrimination against a protected class at all. They rested on associational rights protected by the First *and* Fourteenth Amendments. *See Lubin*, 415 U.S. at 710, 716; *Williams*, 393 U.S. at 30-31; *see also Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.6 (1983).

(applying strict scrutiny to restrictions on independent candidates). The Petition does not cite a single case limiting the analysis in *Storer* to independent candidates.[5] Indeed, as the Second Circuit pointed out, the burdens on a party insurgent closely parallel those on an independent candidate: "both are opposing an entrenched, dominant, and hostile political apparatus." Pet. App. 60a.

B. THE SECOND CIRCUIT'S DECISION DOES NOT "COLLIDE" WITH STORER.

Petitioners assert that the Second Circuit's decision "collides" with *Storer* by creating a constitutional "right to win." Pet. 22. But the court of appeals specifically disclaimed any constitutional "right to win," Pet. App. 45a, holding rather that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest," *id.* at 41a-42a. The Second Circuit affirmed the district court not because insurgent candidates cannot "win," but rather because "New York's nominating process, as found by the District Court... deprives a candidate of access altogether." Pet. App. 45a. Among other evidence, the Second Circuit properly considered proof that not a single insurgent candidate had *ever* obtained a major party nomination for Supreme Court. *See Norman v. Reed*, 502 U.S. 279, 294 (1992) (relying in part on extent of past successes in overcoming alleged burdens to determine their severity).

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[5] Lower courts have uniformly applied *Storer* in cases not involving independent candidacies. *See Bowe v. Board of Election Commr's*, 614 F.2d 1147, 1152, 1153 n.10 (7th Cir. 1980); *Ulrich v. Mane*, 383 F. Supp. 2d 405, 412 (E.D.N.Y. 2005); *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164, 178 (D. Conn. 2003); *Molinari v. Powers*, 82 F. Supp. 2d 57, 70-71 (E.D.N.Y. 2000).

Petitioners also contend that "the proper equivalent to ballot access is convention access, *i.e.*, having a chance to put one's name up for consideration at the convention." Pet. 23 (emphasis omitted). That contention is contrary to the evidence, which showed that "a candidate who lacks the support of her party's leadership has no actual opportunity to lobby delegates." Pet. App. 18a. For a challenger candidate, "access" to the closed convention bears no resemblance to the opportunity to compete for support among the party's voters free of unnecessary and severe burdens; for the party's voters, "access" to the convention not only never occurs, but would, in the words of Petitioners' expert, "twist the design of the system on its head." *Id.* at 17a. That is because "the process of lobbying delegates imposes severe, exclusionary burdens on candidates and voters," *id.* at 64a, and the conventions merely "rubber stamp" the will of the party leadership without consultation or deliberation, *id.* at 45a, 125a-26a. The Second Circuit thus found that mere formal "access" to the conventions to request the nomination does not address the legally relevant problem, namely that "candidates lacking party leaders' support and the voters who wish to associate with them are practically, if not formally, excluded from the nomination process." *Id.* at 45a.

This Court evaluates "the realities" of ballot restrictions, not "empty formalism."[6] The Court's precedents fully support the Second Circuit's insistence on actual, rather than theoretical, voter participation at the nomination phase. As the Court stated in *Classic*:

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[6] *See Clingman*, 544 U.S. at 610 (Stevens, J., dissenting); *id.* at 599 (O'Connor, J., concurring) ("A realistic assessment...require[s] examination of the cumulative effects of the State's overall scheme."); *Tashjian*, 479 U.S. at 234 (Scalia, J., dissenting) (this subject matter "does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case").

> [W]e cannot close our eyes to the fact . . . that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice.

313 U.S. at 319; *see Kusper*, 414 U.S. at 58 ("A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process."); *Bullock*, 405 U.S. at 146-47 (rejecting formal access to general election ballot as a "reasonable" alternative to opportunity to compete at primary election); *Clingman*, 544 U.S. at 590 ("'[t]he moment of choosing the party's nominee'... is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'") (Thomas, J., for a plurality) (internal citations omitted).

This Court has further held that the voters' right to participate at the nomination stage is particularly significant where the party's nomination "effectively controls the choice," *Classic*, 313 U.S. at 318, or "may be more crucial than the general election." *Bullock*, 405 U.S. at 146-47. Here, the "[e]mpirical evidence showed that because one-party rule is the norm in most judicial districts, the general election is little more than ceremony." Pet. App. 23a.

IV. THE SECOND CIRCUIT'S DECISION DOES NOT "CLASH" WITH *WHITE*

Petitioners ignore the fact that *White* is of a piece with the other ballot access cases, and instead rely exclusively on a one-line quotation from *White* to argue that a state may "insist that intraparty competition be settled before the general election by primary election or by party convention." *White*, 415 U.S. at

781. But *White* did not address whether conventions are *per se* constitutional; that question was "not contested." *Id.*

The central question in *White* was whether the burdens imposed by a statute that required minor parties to demonstrate the support of 1% of the electorate (either through a series of conventions or through post-convention signature gathering) was "necessary to further [a] compelling state interest." 415 U.S. at 780; *see id.* at 782-83 & n.14. The Court simply did not address whether the particular convention procedures used in Texas provided members of a party with a sufficient role in the nomination process, much less suggest that *all* conventions would pass muster without regard to the traditional legal standard of review.

Further, the convention system addressed in *White* bears no resemblance to New York's uniquely burdensome and closed hybrid system. Texas's system involved precinct conventions at which any registered voter in the precinct could vote directly for the candidate of his or her choice. 415 U.S. at 784 ("Any voter, however registered, may attend the new party's precinct convention . . . .").

The fact that New York has chosen a hybrid system rather than a primary does not eliminate the candidates' and voters' right to participate free of severe and unnecessary burdens. Otherwise, the First Amendment would limit the ability of a state to burden the right to vote in a primary, but would not apply at all where a state adopts a nomination mechanism that grants a handful of party leaders in a smoke-filled room the unbridled power to choose the party's standard-bearers without *any* voters' input at all. That cannot be the law. "To the excluded voter who cannot cast a vote for his or her candidate, it is all the same whether the party conducts its nomination by a primary or by a convention open to all party members except those kept out by the [restriction]. Each is an 'integral part of

the election machinery.'" *Morse v. Republican Party of Va.*, 517 U.S. 186, 207 (1996) (quoting *Classic*, 313 U.S. at 318).

The Petition suggests that the Second Circuit prohibited the use of conventions. That is not true. The Second Circuit expressly left open the possibility that New York could enact a nominating system that would include a convention of some kind—as long as the system viewed as a whole does not impose the unnecessary and severe burdens that are hallmarks of the current system. Pet. App. 82a-83a. In fact, the State already uses several convention systems for non-judicial offices that do not impose unconstitutionally severe burdens. For example, the State's major parties hold conventions to select their designees for statewide offices; challenger candidates for those offices must gather petitions to obtain a place on the party's primary ballot if they do not succeed at the convention. *See* N.Y. Elec. Law §§ 6-124, 6-126, and 6-158. New York's small towns and villages hold conventions in which *any* resident party member may attend caucuses to nominate candidates for local offices. *Id.* §§ 6-108, 6-202, and 15-108.

The Petition also claims that the lower courts "dismantled New York's chosen election method and replaced it with a primary." Pet. 16. That is silly. The courts temporarily enjoined the operation of the two offending sections of New York's election law, and clarified that the *existing* default provision (§ 6-110) would govern until trial, unless the Legislature sooner chose to enact a system that would survive constitutional scrutiny. Pet. App. 82a-83a. Far from "imposing" a primary, the Second Circuit merely affirmed the district court's deference to the statutory default.[7]

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[7] The Second Circuit also properly rejected petitioners' argument that the district court should have crafted its own version of a judicial convention rather than eliminating the offending statutory provisions. Such tinkering would have required the trial judge "to act as a one-person legislative super-

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Not a single case—and certainly not *White*—has even considered, much less upheld, a convention system anything like New York's uniquely burdensome system. The "clash" Petitioners allege between *White* and this case is entirely fictitious and offers no reason to grant review.

V. THERE IS NO CIRCUIT SPLIT.

In an effort to manufacture a basis for a grant of review by claiming a circuit conflict, Petitioners mischaracterize the holdings of *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), and *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987). Neither case announced or applied legal principles at odds with the Second Circuit.

In *Bachur*, the plaintiff challenged the Democratic National Party's rule requiring each state to send equal numbers of male and female delegates to the party's national convention. *Bachur*, 836 F.2d at 838. The court observed that the plaintiff's "vote for delegates is some steps removed from a vote for an actual candidate for public office" and deemed the restriction to be "limited" rather than severe. *Id.* at 841 (following *Anderson*, *Bullock*, and *Tashjian*). The Court therefore considered whether the restriction had a "rational purpose." *Id.* at 842. The Court emphasized that it was not announcing a *per se* rule: "We do not foreclose the possibility of a different result with respect to a different restriction in a different case." *Id.* at 841. The Second Circuit correctly distinguished *Bachur*, explaining: "In that case, there existed no entry barriers to candidates. Nor did the regulations effectively prevent a party member from voting for their preferred candidate...." Pet. App. 53a.

Footnote continued from previous page
chamber—precisely what is forbidden." Pet. App. 80a

In *Ripon*, the plaintiff challenged the National Republican Party's formula for allocating delegates among the states. *Ripon*, 525 F.2d at 570. The lack of a severe burden was obvious. Indeed, the plaintiff could not even "identify with any confidence the set of people whose preferences are to be given equal and accurate expression." *Id.* at 585 n.58. For that reason, the plurality considered whether the scheme rationally advanced a legitimate interest. *Id.* at 586-87. The plurality also disclaimed any *per se* rule, stating that its decision "might be otherwise in a case where there is only one party with a realistic chance to win the election, and where a vote in the nominating process is the only effective vote that can be cast." *Id.* at 589. Indeed, the plurality explained, "although courts should be slow to interfere with the internal processes of political parties, circumstances can be conceived of wherein they may grant relief." *Id.*. The plurality also distinguished between the internal procedural rules at issue in that case and a burden "mandated by a state statute, applicable to all parties." *Id.* at 589 n.65. The Second Circuit thus correctly distinguished *Ripon*, explaining:

> the convention system considered in *Ripon* was, by and large, a private function that directly implicated the party's right to govern its own internal affairs. By contrast, New York's delegate selection process is one of public election, which directly implicates the associational rights of party members voters and candidates.

Pet. App. 51a-52a (citations omitted).

Petitioners' reliance on *Ripon* and *Bachur* is, accordingly, doubly misplaced. Both involved challenges to the internal rules of the national political parties, not challenges to burdens imposed by statute. And both concerned restrictions that did not block a single candidate from appealing to the voters of his or her party. Neither case stands for the proposition that a State may rely on the associational interests of the party leadership to justify severe burdens, imposed by law, that effectively shut out

voters of the party from the nominating process. Neither case conflicts with the Second Circuit's analysis of New York's unique and extreme statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,
Petitioners,

v.

MARGARITA LÓPEZ TORES, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. FAR FROM BEING FACT-BOUND AND UNIQUE, THE SECOND CIRCUIT'S OPINION SWEEPS BROADLY TO APPLY TO ALL NOMINATING SYSTEMS WHERE PARTY LEADERS INFLUENCE THE OUTCOME 1

II. THE DECISIONS BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *STORER* AND *WHITE* AND CONFLICTS WITH THE DECISIONS OF TWO OTHER CIRCUITS 3

III. THIS CASE IS RIPE FOR REVIEW 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

American Party of Texas v. White,
415 U.S. 767 (1974) 2, 3, 6, 7

Ashcroft v. American Civil Liberties Union,
542 U.S. 656 (2004) 8

Ayotte v. Planned Parenthood of Northern New England,
546 U.S. 320 (2006) 7

Bachur v. Democratic National Party,
836 F.2d 837 (4th Cir. 1987) 5, 6

Bullock v. Carter,
405 U.S. 134 (1972) 3, 4

Burdick v. Takushi,
504 U.S. 428 (1992) 9

Cal. Democratic Party v. Jones,
530 U.S. 567 (2000) 2

City of Mesquite v. Aladdin's Castle, Inc.,
455 U.S. 283 (1982) 9

Clingman v. Beaver,
544 U.S. 581 (2005) 4

Cousins v. Wigoda,
419 U.S. 477 (1975) 2

Democratic Party of United States v. Wisconsin ex rel. La Follette,
450 U.S. 107 (1981) 2

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,
546 U.S. 418 (2006) 8

Gonzales v. Raich,
545 U.S. 1 (2005) 8

Harper v. Virginia State Board of Elections,
383 U.S. 663 (1966).....3

Kusper v. Pontikes,
414 U.S. 51 (1973).....4

LaRouche v. Fowler,
152 F.3d 974 (D.C. Cir. 1998).....5, 6

Lubin v. Panish,
415 U.S. 709 (1974).....3

McCreary County, Ky. v. American Civil Liberties Union of Ky.,
545 U.S. 844 (2005).....8

Moore v. Oglivie,
394 U.S. 814 (1969).....4

Ripon Society v. National Republican Party,
525 F.2d 567 (D.C. Cir. 1975).....5, 6

S.E.C. v. Edwards,
540 U.S. 389 (2004).....8

Smith v. Allwright,
321 U.S. 649 (1944).....3

Storer v. Brown,
415 U.S. 724 (1974).....2, 3, 4

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986).....4

Terry v. Adams,
345 U.S. 461 (1953).....3

U.S. v. Classic,
313 U.S. 299 (1941).....3, 4

STATUTES

28 U.S.C. § 1254(1).....8

MISCELLANEOUS

Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* at 3 (February 6, 2006).....10

Report of the Joint Legislative Comm. on Court Reorganization, Legis. Doc. 24 at 12 (1973).....10

Robert L. Stern et al., Supreme Court Practice § 4.18, at 260 (8th ed. 2002).....8

REPLY BRIEF FOR PETITIONERS

The Second Circuit in this case has bestowed a new constitutional right upon disappointed office seekers to challenge the outcome of their political party's candidate selection process. Finding that "challenger candidates" competing within their own political party have a First Amendment right to a "realistic opportunity to participate in the nominating process," the Second Circuit deviated wildly from the law governing intraparty contests – whether by convention, primary or other means. The decision below thus presents questions of national importance warranting this Court's review.

I. FAR FROM BEING FACT-BOUND AND UNIQUE, THE SECOND CIRCUIT'S OPINION SWEEPS BROADLY TO APPLY TO ALL NOMINATING SYSTEMS WHERE PARTY LEADERS INFLUENCE THE OUTCOME

Putting aside the enormous public impact of a decision that demolished an 84-year old statutory framework for picking trial judges throughout the third largest state in the nation – which is reason enough for Supreme Court review – this case is certworthy because of its nationwide impact on all candidate nominating systems.

First, this case directly applies to any electoral system involving a representative form of democracy, including party conventions. While Respondents would paint New York's convention system as "unique" and this case as "fact bound" (Resp. Br. 16), party conventions have been a feature of American politics for two centuries. In fact, this Court itself has on more than one occasion reviewed cases involving the national party conventions and protected the constitutional rights of political parties. *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107,

124 (1981) ("A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution."); *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (a political party's "right of association carries with it a right to determine the party's own criteria for selection of delegates to its national convention"). This Court has also blessed the use of nominating conventions at the state level, holding in *American Party of Texas v. White*, 415 U.S. 767, 781 (1974) that "[i]t is too plain for argument that the State . . . may insist that intraparty competition be settled . . . by primary election or by party convention." Yet, the Second Circuit would deprive parties of that choice by mandating that all nominations proceed by primary or its functional equivalent.

Second, the broad and novel constitutional principles pronounced by the Second Circuit, including the gross departure from this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), apply to any nomination process, misguidedly inviting federal courts to once again "peer inside . . . political clubhouses" (App. 5) to determine whether party leaders had such sway over candidate selection that disfavored candidates had no "realistic opportunity to participate." Likewise, the Second Circuit's determination to subordinate the political parties' First Amendment associational rights to those of challenger candidates and voters puts all nominating schemes at risk. Indeed, aspects of the New York system that the Second Circuit deemed so constitutionally repugnant have been common features of political parties' organizations and operations for over 200 years, including their core function of selecting nominees for office. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000) (characterizing the "candidate-selection process" as "the basic function of a political party") (internal quotation marks and citation omitted). As *amicus curiae* Republican National Committee

("RNC") stated, "[a]bsent review by this Court, the decision below will cast into doubt the constitutionality of myriad state election laws and the bedrock associational freedoms of political parties." RNC at 3.

Granting *certiorari* is thus warranted to correct the Second Circuit's impermissible expansion of First Amendment protections into intraparty affairs and to enable this Court to explain for the first time how to resolve challenges to state laws and/or party rules dealing with party members' access to the nomination stage of an electoral process where invidious discrimination is not at issue.

II. THE DECISIONS BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *STORER* AND *WHITE* AND CONFLICTS WITH THE DECISIONS OF TWO OTHER CIRCUITS

1. Respondents' brief in opposition entirely skips the threshold question of whether the ballot access test formulated in this Court's *Storer* decision even applies to determining the scope of First Amendment rights in the context of intraparty competition. The handful of cited primary ballot access cases stand for a proposition that is not in dispute: namely, the state action requirement for triggering constitutional protection against invidious discrimination is satisfied at the nomination stage. (*See* Pet. Br. 19 n.2) (discussing *Bullock v. Carter*, 405 U.S. 134 (1972), *Lubin v. Panish*, 415 U.S. 709 (1974), *U.S. v. Classic*, 313 U.S. 299 (1941) and *Terry v. Adams*, 345 U.S. 461 (1953), all of which concern Fourteenth or Fifteenth Amendment rights and *invidious discrimination*). The "white primary" cases (*Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry*) and the poll tax case (*Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) they cite involve discrimination by race or wealth. The other line of cases from which the *Storer* ballot access test emerged concerns exclusions of minor or

non-party, independent candidates from the general election ballot – *i.e.* this Court's "freeze out" line of ballot access cases of which *Moore v. Oglivie*, 394 U.S. 814 (1969) is an example. Respondents do not, because they cannot, dispute that these cases do not address *intraparty* competition. *Storer's* "reasonable diligent independent candidate" test *has never been applied to the nomination phase* and this Court should grant the petition to set the applicable test. *Kusper v. Pontikes*, 414 U.S. 51 (1973), *Clingman v. Beaver*, 544 U.S. 581 (2005) and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), which address party disaffiliation requirements within the primary setting, are not relevant here.

To the extent *Storer* has any application here, the Second Circuit distorted the Court's ruling by crudely and improperly retrofitting the *Storer* test to apply to the arena of intraparty competition. While purporting to disclaim the admittedly improper "right to win" standard (Resp. Br. at 22), the Second Circuit in fact relied on the outcome of nomination contests to measure whether its "challenger candidates" are afforded a "realistic opportunity to participate." (Pet. Br. 22-23; Resp. Br. 22).

Respondents attempt to rescue the "realistic opportunity" standard by arguing that *Classic* and *Bullock* support "the Second Circuit's insistence on actual, rather than theoretical, voter participation at the nomination phase." (Resp. Br. at 23). But *Classic* and *Bullock* are primary cases where state legislatures specifically granted voters the right of expressing their preferences directly for candidates, unlike here where voters' intended role is to select delegates who representatively choose nominees.

By assuming its own conclusion that there is a First Amendment right to vote directly for judicial candidates, the Second Circuit reached the inevitable result that New York's representative system is unconstitutional. But when the

scope of the right is viewed from the appropriate perspective of the roles that the Legislature accorded to the various participants in the process – *i.e.* (i) rank-and-file members vote for delegates of their choosing, and (ii) delegates select candidates of their choosing – the convention system passes constitutional scrutiny with ease.

2. Despite the efforts of Respondents to distinguish *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) and *Ripon Society v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) on the facts (Resp. Br. at 28), there is a genuine conflict between those courts of appeal and the Second Circuit on the appropriate legal test when the First Amendment rights of voters collide with the co-equal First Amendment rights of political parties.

Respondents do not dispute that *Bachur* and *Ripon* applied a different legal test than the Second Circuit – a flexible balancing test weighing the competing First Amendment rights of political parties versus those of voters and candidates, rather than a strict scrutiny analysis, which unjustifiably favors the First Amendment rights of voters and candidates over the rights of political parties. Nor do they address the D.C. Circuit's holding in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), that the strict scrutiny review applied by this Court in its ballot access decisions does not apply where, as here, a political party asserts First Amendment rights in its own nominating process.

Respondents' proffered distinction that *Ripon* and *Bachur* involved challenges to internal party rules as opposed to challenges to state laws is factually inaccurate. The number of delegates to New York's judicial convention – crucial to the Second Circuit's decision – is established by party rule, not by statute. (App. 104). Further, as discussed *supra*, the nominating convention does not "block entry" of candidates when considering that the true convention analog

to ballot access is merely the opportunity of a candidate to have his name considered by the delegates.

At its heart, the Second Circuit's decision reveals a deep hostility toward the First Amendment associational freedoms of political parties. To suppress the undeniable rights of political parties to choose their own nominees, to avoid party-raiding and to engage in ticket-balancing, the Second Circuit deviated from the flexible basis balancing test of *Ripon*, *Bachur* and *LaRouche*, creating a genuine circuit split, which this Court should resolve by granting this petition.

3. Faced with this Court's holding in *White* that a convention can be a constitutional alternative to a primary, Respondents resort to attacking a straw man argument they wrongly attribute to Petitioners, *i.e.*, that all conventions are *per se* constitutional. (Resp. Br. at 25). But petitioners make a different point. *White* would be meaningless if a convention must be equivalent to a primary to pass constitutional muster, yet this is what the Second Circuit has wrongly concluded.

Respondents prove our point by proffering as an example of a constitutional convention a system involving voters petitioning their favored candidate onto a primary ballot for their party's nomination against candidates endorsed at the party's convention. (Resp. Br. at 26). In this variation, a convention is simply a precursor to a primary, not an alternative to one, as it provides one means of accessing the primary ballot.

Finally, Respondents claim that the lower courts did not dismantle or otherwise prohibit the convention by replacing it with a primary, but merely deferred to the statutory default provision of a primary and left open the possibility for the enactment of a convention. (Resp. Br. at 26). Not only does the statute not have a primary default,

but Respondents ignored this Court's directive in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), that the remedy should have been narrowly tailored to fit the purported constitutional defect in light of legislative intent to replace New York's failed experiment with judicial primaries with judicial conventions.

The deeply mistaken view of the Second Circuit that the First and Fourteenth Amendments mandate *direct* voter participation in candidate selection clashes with *White*, and, thus, serves as another basis for granting this petition.

III. THIS CASE IS RIPE FOR REVIEW

Opposing the Petition, Respondents raise two contradictory procedural arguments. Respondents first argue that *certiorari* is unwarranted because the lower court decisions are interlocutory and based upon a factual record that may change during a trial on the merits. In the same breath, Respondents then argue that the Legislature is poised to alter the statutory scheme at issue, thereby avoiding a full trial on the merits and rendering this appeal moot. Neither argument counsels against review by this Court.

1. Although technically interlocutory in nature, the district court's mandatory injunction, which the Second Circuit affirmed, is effectively a final order granting the ultimate relief sought in this case. The lower court decisions will have an immediate and irrevocable effect on current and future election cycles. The results of these elections will be permanent notwithstanding the outcome of a trial on the merits. For instance, fourteen incumbents of the New York State Supreme Court who have been absent from politics during their fourteen year terms immediately would be forced to run in primary campaigns that Respondents' expert below called "nasty, noisy and expensive." If these incumbents were to lose, or choose not to run for the same

reasons that motivated New York to reject primaries in 1921, their injury would be irreparable.

In any event, it is well-established that "the interlocutory status of the case may be no impediment to *certiorari* where the opinion of the court below has decided an important issue, otherwise worthy of review, and Supreme Court intervention may serve to hasten or finally resolve the litigation." Robert L. Stern *et al., Supreme Court Practice* § 4.18, at 260 (8th ed. 2002); *see also* 28 U.S.C. § 1254(1).[1]

Here, a trial on the merits would be pointless because the legal framework articulated by the lower courts will inevitably lead to the same conclusion. In their view, the question of whether the judicial convention system poses a severe burden on First Amendment rights must be measured by whether so-called "challenger candidates" can *succeed* in either (i) attracting enough delegates to run on their behalf and enough signatures to place those delegates on the primary ballot (App. 62-63), or (ii) lobbying the support of delegates supposedly selected by party leaders. Certainly, as to the former, a trial would add nothing of value to the factual record as the signature and delegate requirements are not in dispute. As for the latter, a trial would be to no avail because the circular definition of a challenger candidate as one who "lacks the support of party leadership" (App. 61) predetermines the result. Invariably, candidates who attract

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[1] This rule is borne out by the actual practice of this Court. In recent terms, this Court has reviewed numerous such interlocutory cases, including cases arising in a posture similar to the case at bar. *See e.g., Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (involving appeal of preliminary injunction); *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (same); *Gonzales v. Raich*, 545 U.S. 1 (2005) (same); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) (same); *S.E.C. v. Edwards*, 540 U.S. 389 (2004) (same).

substantial support during a campaign, whether a primary or convention, will likewise attract the support of party leadership and cease to be regarded as a challenger. Based on this flawed paradigm, the lower courts concluded there were no successful challengers and no additional evidence of hard-won victories by insurgent candidates could be expected to change the result at trial.

2. Respondents' conjecture that review is unsuitable because the Legislature may be forced to adopt a new nomination scheme at the sword point of an injunction is disingenuous. The Legislature's compliance with a federal court order should not frustrate review by this Court, lest *certiorari* be denied in all cases where an important statute is invalidated on Constitutional grounds. Of course, the law is to the contrary. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . In this case the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.").

In any event, there are widely divergent views among New York lawmakers on how the Legislature should respond to the lower court decisions and the outcome of any future legislative effort is far from clear. Both chambers of the Legislature (despite being controlled by different parties) have expressed the view that the convention system should be retained, arguing in its *amicus* brief submitted at the invitation of the court of appeals, that the preliminary injunction should be vacated because it trespassed on the core power of New York to regulate its own elections. New York State Legislature *Amicus* Br. at 5, citing, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citations omitted). While the judicial nominating convention has been the subject of

serious public and legislative debate in the past, the Legislature's decision to restore the convention in 1921 has – until the district court's decision – survived the test of time. *See, e.g., Report of the Joint Legislative Comm. on Court Reorganization*, Legis. Doc. 24 at 12 (1973) (recommending that Court of Appeals judges be appointed by the Governor but concluding it was "undesirable" to change the method by which judges for other courts are elected); Tr. 344: 1-12 (Regan) (describing the 1967 New York constitutional convention at which changes to the judicial nominating convention process were considered and rejected).

Even after the district court issued its preliminary injunction, the New York State Commission to Promote Public Confidence in Judicial Elections issued its final report, concluding that conventions are preferable to primaries for nominating candidates for the office of Supreme Court Justice. *See* Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* at 3 (February 6, 2006). Yet, counsel for Respondents threatened further litigation if the Legislature were to adopt that recommendation. As for recently-elected Governor Eliot Spitzer, who signed the petition as New York's Attorney General, he announced his support for amending New York's Constitution to establish an appointive system – a process that would take several years and faces strong opposition in the State Senate. Unless this Court resolves the legal issues in this case, there will be no clear constitutional guidance for the Legislature to follow and future judicial elections will remain clouded.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, et al.,
Petitioners,

v.

MARGARITA LÓPEZ TORRES, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS KELLNER, NEIL W. KELLEHER, HELENA MOSES DONOHUE AND EVELYN J. AQUILA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The Second Circuit's Decision Raises Questions Of Exceptional Importance For The Future Of Party Nominating Contests 1

II. The Decision Below Cannot Be Justified By This Court's Ballot Access Decisions And Conflicts With The Decisions Of Other Courts of Appeals 5

III. This Case Is Not Only Suitable For Review, But Urgently Calls For It 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

American Party of Texas v. White, 415 U.S. 767 (1974) 8

Anderson v. Celebrezze, 460 U.S. 780 (1983) 6

Bachur v. Democratic National Party, 836 F.2d 837 (4th Cir. 1987) 4, 8

Bullock v. Carter, 405 U.S. 143 (1972) 2, 6, 7

California Democratic Party v. Jones, 530 U.S. 567 (2000) 7

Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) 3

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 9

LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir. 1998) 8

López Torres v. New York State Board of Elections, 411 F. Supp. 2d 212 (E.D.N.Y. 2006) 2, 5

Lubin v. Panish, 415 U.S. 709 (1974) 6

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 7

Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) 3, 8

Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) 9

Storer v. Brown, 415 U.S. 724 (1974) 6

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 7

Terry v. Adams, 345 U.S. 461 (1953) 1, 6

United States v. Classic, 313 U.S. 299 (1941) 1, 6

Vitek v. Jones, 445 U.S. 480 (1980) 9

Williams v. Rhodes, 393 U.S. 23 (1968) 5

OTHER AUTHORITIES

http://www.legis.state.pa.us/WU01/VC/visitor_info/creating/executive.htm 4

REPLY BRIEF FOR PETITIONER

The court of appeals held that a political party violates the First Amendment rights of those seeking its nomination for elected office whenever the party burdens the potential candidate's ability to compete for the party's nomination. That holding grants a new federal constitutional cause of action to virtually every disappointed would-be party nominee for federal, state, and local office to challenge the outcome of the political party's nominating process, and thereby portends to cast party politics across the nation into turmoil. The decision below presents questions of undeniably wide practical importance and conflicts with decisions of this Court and two other circuits. It accordingly warrants this Court's review. The nominally interlocutory posture of this case should not be an impediment to that review. The Second Circuit's decision makes clear that there will be no trial; the district court ordered the New York State Legislature to change the law, and, in the interim, installed precisely the direct primary that the Legislature, in 1921, was at pain to reject.

I. The Second Circuit's Decision Raises Questions Of Exceptional Importance For The Future Of Party Nominating Contests

The Second Circuit has pronounced a new constitutional rule that grants frustrated would-be party nominees unprecedented access to the federal courts. Distilling what it identified as the "animating principle" of this Court's ballot access decisions of *United States v. Classic*, 313 U.S. 299 (1941), and *Terry v. Adams*, 345 U.S. 461 (1953), the Second Circuit held that the constitutional protections afforded candidates' participation in public elections should be extended to safeguard prospective candidates' participation in any political party nominating contest that qualifies as an "integral part[] of [a] State's election machinery." Pet. App. 41. "[T]he First Amendment affords candidates and voters," the Second Circuit concluded, "a realistic opportunity to participate in the nominating process, and to do so free from burdens that

are both severe and unnecessary to further a compelling state interest." *Id.* at 41-42; *see also id.* at 45 (affirming a "'right to . . . *compete* for their major party's nomination' free from burdens that are both severe and unnecessary" (quoting *López Torres v. N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 245 (E.D.N.Y. 2006) (emphasis in original)). That such a right would attach to a public primary is unsurprising; that the Second Circuit extended it to party conventions is extraordinary and radically alters the law governing party nomination contests.

In the instant matter, the Second Circuit found that the New York convention system for selecting Supreme Court Justices "burdens the associational rights of candidates" by "preclud[ing] all but candidates favored by party leadership 'from seeking the nomination of their chosen party . . . .'" *Id.* at 70 (quoting *Bullock v. Carter*, 405 U.S. 134, 143-44 (1972)). That is, a party may not "exclude its own members from the nominating phase." *Id.* at 71. The Second Circuit found such "exclu[sion]" here based on the district court's completely unsurprising determination that "judicial delegates" regularly "endorse the choices of party leadership." *Id.* at 69. It typically was those same party leaders, after all, who drafted the delegates to run. *See id.* at 16.

The Second Circuit never expressly delineated the contours of would-be candidates' First Amendment associational rights at party conventions, choosing instead only to tear down the system before it. Presumably, party nominating conventions must include a "realistic opportunity" for all electoral hopefuls to convince delegates to nominate them. And it appears that party leaders may not exert too much influence on the process, lest the leadership render the "realistic opportunity" unrealistic and thereby deny a prospective candidate his or her "right to compete" for the party's nomination.

Respondents attempt to downplay the significance of the decision below by characterizing the electoral scheme at issue in New York as an "arcane system [that] has no analog in

the current statutory nomination systems in other states." Opp. 16. While the intricacies of New York's delegate allocation formulae may be unusual, delegate nominating conventions are commonplace in American politics. And the broad, novel constitutional principles pronounced by the Second Circuit would apply to any situation in which a political party is authorized by law to stage a convention for the purpose of selecting a candidate to run for public office. Indeed, the niceties of the New York system are irrelevant, because the legal rule articulated by the Second Circuit applies to every "nominating phase" sanctioned by law.

By focusing on the details of the New York process, respondents seek to draw this Court's attention away from the devastating impact that the Second Circuit's ruling could have on political parties nation-wide. The decision below offers judicial review to any disappointed candidate who attributes his or her political defeat to nebulous (and obviously nefarious) "party bosses." But some of the aspects of New York's system that the Second Circuit found so constitutionally repugnant have been common features of U.S. political parties' organizations and operations for over 200 years. That the rank-and-file members enjoy a constitutional right to wrest control of the party nomination process from party leaders could strike fatally at the core purpose of a political party. *See Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 634 (1996) (Thomas, J., concurring in judgment and dissenting in part) ("[O]f course, one of the main purposes of a political party is to support its candidates in elections.").

For generations, party leaders have exercised disproportionate influence over party nominations. As the amicus brief of the Republican National Committee ably highlights, until the last half-century presidential nominating conventions were structured so that state party leaders essentially controlled the outcome. *See* Rep. Nat'l Comm. Amicus Br. 17. In fact, in *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976), the D.C. Circuit remarked that the Republican

National Committee "makes numerous important political decisions" and that "[t]he fortunes of presidential hopefuls rise and fall with such decisions." 525 F.2d at 583. Similarly, the Fourth Circuit acknowledged in *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987), that "standing between the individual voter and the eventual nomination of a candidate may be numerous party rules and procedures so that the will of the majority of the electorate expressing a presidential preference and the selection of delegates may be only partially translated into the actual nomination." 836 F.2d at 842.

Beyond national elections, the Second Circuit's decision will also reverberate across the country in nominating conventions for state and local office. In fact, the first party nominating convention was in a contest for state office, when Democrats in Pennsylvania nominated William Findlay for governor in 1820. *See* http://www.legis.state.pa.us/WU01/VC/visitor_info/creating/executive.htm. And today, political parties in states ranging from Massachusetts to Oregon use nominating conventions to select gubernatorial candidates. Temptation will be strong among failed candidates to wield the Second Circuit's decision as a weapon to revisit their convention defeats. Inquires will be made into whether party officials unfairly influenced the outcome, or whether party rules put "insurgent candidates" at a disadvantage vis-à-vis establishment candidates. In short, political parties on all levels will either have to regulate closely their nominating conventions to comply with the Second Circuit's rigid openness and nonintervention requirements, or face, as New York does now, the installation of open primaries.

But even assuming for the sake of argument that the Second Circuit's decision could be cabined to only affect New York Supreme Court Justices, the ruling would still have a profound impact. There are over 400 New York Supreme Court Justices—14 of whom are expected to run for reelection this year. Overnight, the decision below has transformed these jurists, who have not run for office in 14 years, into politicians who must raise in the next few months

enough money to fund contested primary campaigns in the nation's most expensive media market. *See* Asian Am. Bar Ass'n Amicus Br. 11. Suddenly, the high-profile trials conducted by the New York Supreme Courts will acquire a political element, as a Justice's rulings could be scrutinized in light of the Justice's electoral future. This is the very sort of politicization of the judiciary that the New York State Legislature rejected in 1921. *See* Pet. App. 9-10. And with the rise in popular animosity toward the judiciary in recent years, the infusion of politics into the New York judicial system at this time could prove particularly toxic.

Left undisturbed, the Second Circuit's decision will tear asunder New York's carefully crafted system for electing its judges of general jurisdiction, significantly impact the state's judiciary, and potentially disrupt the workings of political parties on all levels. The broad practical impact of the Second Circuit's enlargement of candidates' First Amendment rights warrants this Court's review.

II. The Decision Below Cannot Be Justified By This Court's Ballot Access Decisions And Conflicts With The Decisions Of Other Courts of Appeals

The Second Circuit held that aspiring politicians have a right under the First Amendment to "a realistic opportunity to participate" in a political party's "nominating process," free from burdens "severe and unnecessary to further a compelling state interest." Pet. App. 41-42. This new First Amendment right guarantees to "insurgent candidates" the opportunity to "'*compete* for their major party's nomination.'" *Id.* at 45 (quoting *López Torres*, 411 F. Supp. 2d at 245) (emphasis in original)). In the Second Circuit's view, any "nomination phase" that "'effectively foreclose[s]'" competition from so-called insurgent candidates is constitutionally suspect. *Id.* at 42 (quoting *Williams v. Rhodes*, 393 U.S. 23, 35 (1968) (Douglas, J., concurring)). By holding that a candidate's First Amendment right to access extends not just to *general election ballots*, but instead to *all* state-sanctioned nomination processes – primary, caucus, delegate convention, what-

ever—the Second Circuit greatly enlarged the First Amendment rights of aspiring candidates, and transcended completely the decisions of this Court on which it purported to rely.

1. *All* of the cases on which the Second Circuit relied are *ballot access* cases. *See, e.g., Bullock v. Carter*, 405 U.S. 134 (1972) (holding that large filing fee to have name placed on primary ballot violated Equal Protection Clause of Fourteenth Amendment). For at least two reasons, these ballot access decisions cannot justify the Second Circuit's radical reworking of New York's convention nomination system.

First, this Court has *never* held that candidates have a First Amendment right of access to a party *primary* ballot. This Court has found such a First Amendment right of access only to *general election* ballots. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Storer v. Brown*, 415 U.S. 724 (1974). To the extent that the federal Constitution curtails the authority of states to limit access to political primaries, it does so only under the Equal Protection Clause. *See* Pet. 19 n.2 (discussing this Court's opinions in *Bullock*, *Lubin*, *Classic* and *Terry*—cases concerning Fourteenth or Fifteenth Amendment rights and invidious discrimination).[1] That the First Amendment does not significantly restrict political parties' ability to regulate their primary elections is unsurprising. As long as there is a reasonably open and meaningful *general* election, limitations on access to a political party's primary election will not significantly impact voters' oppor-

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[1] Respondents' claim that *Bullock* and *Lubin v. Panish*, 415 U.S. 709 (1974), rested on associational rights under the First and Fourteenth Amendments (*see* Opp. 21 n.4) is plainly incorrect. *See Bullock*, 405 U.S. at 141 ("power [to regulate elections] must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment"); *Lubin*, 415 U.S. at 713 (grounding decision on "gradual enlargement of the Fourteenth Amendment's equal protection provision in the area of voting rights"). Thus, respondents' reliance on a "unitary standard" of strict scrutiny that applies "in any context" in which the right to vote is burdened is badly misplaced. *See* Opp. 20.

tunity "to band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Moreover, any restriction on the party's ability to regulate its primary election necessarily impinges on the political party's coequal right under the First Amendment to select its candidates for office. *Id.* at 581 (characterizing the "candidate-selection process" as "the basic function of a political party" (internal quotation marks and citation omitted)); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (First Amendment protects a political party's "determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals").

Second, even assuming that the First Amendment does limit political parties' rights to regulate their primary elections—and it does not—this Court has *never* found that those party members' First Amendment rights guarantee access to other nominating processes employed by political parties, such as the delegate conventions enjoined by the decisions below. Taken together, the cases on which the Second Circuit relied establish, at most, that a state, having set up an election, may not erect onerous barriers to candidates placing their names on the ballot, absent a compelling state interest. *See, e.g.*, *Bullock*, 405 U.S. at 147. But this Court has *never* held that candidates' First Amendment rights compel access to other nomination processes. Respondents complain that such "cannot be the law"—that it cannot make a constitutional difference whether a political party selects its nominees via primary, or delegate convention, or "smoke-filled room." Opp. 25. But as the Second Circuit itself recognized, it is only when a state "'chooses to tap the energy and legitimizing power of the democratic process,'" that "'it must accord the participants in that process the First Amendment rights that attach to their roles.'" Pet. App. 34 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)). If the First Amendment grants to candidates access to party nomination processes at all, it does so only when the party chooses to hold a primary election. As this Court recognized

though, "[i]t is too plain for argument" that "the State . . . may insist that intraparty competition be settled before the general election by primary election *or by party convention*." *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (emphasis added).

2. The Second Circuit's application of strict scrutiny to New York's delegate convention system—without regard to political parties' First Amendment interests—conflicts starkly with the D.C. Circuit's and Fourth Circuit's balancing approach to substantially similar First Amendment claims.

Respondents nowhere dispute that *Ripon* and *Bachur*, when faced with competing First Amendment interests of candidates and parties, applied a balancing test that differs widely from the Second Circuit's brand of strict scrutiny. Nor do they dispute that, in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), the D.C. Circuit held that this Court's ballot-access strict scrutiny has no application where, as in this instance, a party asserts its First Amendment rights with regard to its own nominating process—even when the party completely excluded delegates supporting an "insurgent candidate" from a nominating convention.

Respondents contend only that these cases are factually distinguishable. They involved, according to respondents, challenges to internal party rules as opposed to challenges to state laws, and did not concern restrictions that blocked candidates from appealing to voters of their party. *See* Opp. 28. But this distinction between state law and internal rules cannot possibly make a difference here, where what the Second Circuit found to be the principal insuperable obstacle to insurgent candidates' participation in the nominating conventions—the delegate allocation formulae—are established by party rule, not by statute. *See* Pet. App. 11-12. This conflict among the circuits over the applicable standard of review is substantial and warrants this Court's review.

III. This Case Is Not Only Suitable For Review, But Urgently Calls For It

Respondents argue that Supreme Court review of the Second Circuit's decision would be "premature" for two reasons. Neither is substantial.

First, respondents note that the ruling below is interlocutory. *See* Opp. 17. But it is certainly within this Court's power to review preliminary injunctions, and it has done so often enough. *See, e.g., Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997). Such review is particularly warranted where, as here, further proceedings necessarily will not alter the legal standard to which error is assigned.

Second, respondents suggest that the New York State Legislature may soon enact legislation that could moot this case. *See* Opp. 17. This rather cynically exploits the district court's preliminary injunction that, rather than severing those aspects of state law causing the supposed infirmity, struck down the relevant legal regime *in toto* and left the State with the Hobson's choice of enacting "corrective legislation" or accepting the federal courts' correction of open primaries—a procedure that New York has tried in the past and the Legislature has rejected. *See* Pet. 3. With the fall election season rapidly approaching, and fourteen judges up for reelection, the State is following the only responsible course of action.

Even assuming that all of respondents' speculation comes to fruition and the legislation they predict comes to pass, such an enactment would not moot petitioners' appeal in any event. Compliance with a court order renders a case moot only if it is "absolutely clear" that, even in the absence of the injunction, "the allegedly wrongful behavior could not reasonably be expected to recur." *Vitek v. Jones*, 445 U.S. 480, 487 (1980). Here, vacatur of the injunction would free the Legislature to repeal the court-mandated "reforms" and to restore the state's convention system to the form it had held for 84 years before the district court's incursion into politics.

Indeed, if the Legislature's recent activity suggests anything at all, it suggests the final nature of the district court's "temporary remedy."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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In The Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER, CAROL BERMAN, HELEN MOSES DONOHUE, and EVELYN J. AQUILA, in their official capacities as Commissioners of the New York State Board of Elections, New York County Democratic Committee, New York Republican State Committee, Associations of the New York State Supreme Court Justices in the City and State of New York, and JUSTICE DAVID DEMAREST, individually, and as President of the State Association, ELIOT SPITZER, Attorney General of the State of New York,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER, Common Cause/NY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
INTRODUCTION	2
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. The Lower Courts Failed To Properly Apply *Ayotte* Because Of Their Misreading Of The New York State Election Law	6
II. A Partisan Open Primary Election System Will Likely Disadvantage Asian Americans Because Voting Will Tend To Take Place Along Ethnic Lines	8
III. District-Wide Judicial Elections In New York State Would Be Prohibitively Expensive	11
IV. The Lower Courts Erred By Permitting The Enactment Of New State Action In The Form Of Open Primaries After Striking New York's Judicial Convention Statutes In Their Entirety	14
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

American Party of Texas v. White, 415 U.S. 767 (1974) 2

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 126 S.Ct. 961 (2006) .....*passim*

Butts v. City of New York, 614 F. Supp. 1527 (E.D.N.Y. 1985) 9

Dickinson v. Indiana State Election Bd., 933 F.2d 497 (7th Cir. 1991) 6

López-Torres v. New York State Bd. of Elecs., 2006 WL 929363, No. 04 CV 1129 (JG) (E.D.N.Y. April 7, 2006) 7

Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt, 796 F. Supp. 681 (E.D.N.Y. 1992) 9

Storer v. Brown, 415 U.S. 724 (1974) 2

United States v. Booker, 543 U.S. 220 (2005) 6, 14

Upham v. Seamon, 456 U.S. 37 (1982) 6

Waldhill Pub. Corp. v. Landoll Inc., 43 F.3d 775 (2d Cir. 1994) 6

Whitcomb v. Chavis, 403 U.S. 124 (1971) 6

TRANSCRIPTS

Connor, Martin, Testimony of, Appellants' Hearing Exhibits and Transcript Volume 10 (Tr. 2124:4-2125:4) 9

Hechter, Michael, Testimony of, Appellants' Hearing Exhibits and Transcript Volume 10 (Tr. 1223:8-21) 8

TABLE OF AUTHORITIES – Continued

Page

Ward, Dennis, Testimony of, Appellants' Hearing Exhibits and Transcript Volume 10 (Tr. 343:23-344:1) 9

STATUTES

S. Ct. Rule 10(a) 2

S. Ct. Rule 10(c) 2

New York Election Law § 6-106, Pet. App. 186 ..... 3, 7

New York Election Law § 6-110 ..... 3, 6, 7

New York Election Law § 6-124, Pet. App. 186 3

New York Election Law § 6-136 7

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TABLE OF AUTHORITIES – Continued

Page

Lipsitz, William, Declaration in Support of Plaintiffs' Motion for Preliminary Injunctive Relief, dated June 1, 2004 (JA-300) 12

Medina, Jennifer, *Albany Is Split Over a Plan to Pick Judges,* New York Times, February 28, 2006 14

Niesse, Mark, *Study: Minority Candidates for State Office Often Raise Less Money,* Associated Press, March 29, 2006 13

SRDS Service Reports (Standard Rate and Data Service) 11

Webster, Peter D., *Selection and Retention of Judges: Is There One Best Method?*, 23 Fla. St. U. L. Rev. 1 (Summer 1995) 5

STATEMENT OF INTEREST[1]

Amicus Curiae Asian American Bar Association of New York ("AABANY") is a membership organization which represents the interests of approximately 4,000 Asian American attorneys in New York. Since its incorporation in 1989, AABANY has taken an active role in advocating and promoting diversity in the judiciary and has taken positions on legal issues that affect the access of Asian Americans and other minorities to the electoral process.

AABANY filed a brief *amicus curiae* in the court of appeals seeking reversal of the district court decision on the grounds that the district court failed to narrowly tailor its injunctive relief to fit the purported constitutional infirmities set forth in its preliminary injunction decision. Because of the direct and negative impact that the lower courts' remedy of judicial district-wide primaries will have on Asian Americans, from both an ethnic diversity and an associational rights perspective, AABANY is in a unique position to aid this Court in understanding the issues presented by the petition, particularly with regard to the district court's improper remedy, which is a subsumed component of the first question presented by the petition for a writ of *certiorari*.

AABANY agrees with the petitioners that this appeal involves (1) an existing circuit split on the issue of the

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, the *amicus curiae* discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

constitutionality of New York's convention system and (2) important issues of Constitutional law, which firmly support granting of *certiorari*. S. Ct. Rules 10(a) & (c).

INTRODUCTION

This Court has previously held that it is "[i]t is too plain for argument . . . that the State may properly limit each political party to one candidate for each office on the ballot and may insist that intra party competition be settled before the general election by primary election or by party convention." *American Party of Texas v. White*, 415 U.S. 767 (1974), citing, *Storer v. Brown*, 415 U.S. 724, 733-736 (1974). New York State has chosen to have intra-party competition between candidates for its court of general jurisdiction, the New York State Supreme Court, settled in party conventions. Yet, by judicial fiat, the district court jettisoned New York's convention system in favor of the very system New York State intentionally chose *not* to adopt with regard to this office - open primaries. Assuming the existence of the purported constitutional infirmities found by the district court - too many delegates, too many petition signatures and too little time to lobby delegates - they each should have been addressed, as mandated by this Court's decision in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), while maintaining New York's 85-year-old convention system.

SUMMARY OF ARGUMENT

The court of appeals and district court refused to correctly apply *Ayotte* and directed open primaries as an "interim" remedy based upon a non-existent primary default provision supposedly contained in New York's election law.[2] Pet. App. 82 (discussing the purported default nature of Election Law § 6-110); *id.* at 23 (noting that the district court enjoined conventions "[b]ased upon the provision of state election law providing for primary elections as the default nominating process. . . ."). Yet, New York's election law contains no such "default" provision to open primaries for the office of New York State Supreme Court Justice. Rather, Election Law § 6-110 specifically states that a primary election be used "*except as provided herein.*" Election Law § 6-106, in turn, expressly provides that nominations for Supreme Court Justice will be by party convention. Thus, rather than providing for an open primary "default," Election Law § 6-106 actually embodies the legislature's intention to have nominations for this elective office conducted by convention.

These erroneous readings of the New York State election law tainted the court of appeals' entire analysis of the propriety of the district court's directive mandating New York to use open primaries as a so-called interim remedy. If the court of appeals had considered the various *Ayotte* factors, it may have attempted to remedy the supposed constitutional infirmities by ordering reductions

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[2] The lower courts struck down Election Law § 6-106 and § 6-124 as unconstitutional. Election Law § 6-106 pertains to party nominations for justices of the New York State Supreme Court. Election Law § 6-124 contains the statutory procedures for judicial conventions. Pet. App. 186.

in the number of signatures required on designating petitions, reduction of the number of delegates at the nominating conventions and/or expansion of the time New York State Supreme Court judicial candidates have to lobby delegates.

Likewise, the court of appeals could have, and should have, taken into consideration the fact that a remedy of judicial district-wide partisan elections has the grave potential of leading to a "tyranny of the majority" to the detriment of Asian Americans, one of the least powerful and most underrepresented ethnic minorities in New York state. The existing nominating system, whatever its flaws, does not present Asian Americans with the same barriers that they may face in a partisan election process. The latter process is one in which voting along ethnic lines would most likely prevail to the detriment of small minority groups such as Asian Americans. Indeed, a partisan electoral process is one in which cash is king - again an insuperable barrier to the aspirations of many Asian Americans who generally lack the resources and the political clout to raise the hundreds of thousands of dollars, if not millions of dollars, needed for judicial races in New York.

As a result of the demographic and fiscal challenges posed by a partisan election system, Asian Americans have been virtually shut out of judgeships in the states where such systems prevail. Eight states, encompassing approximately 25% of the nation's population, have partisan election systems similar to the system that the lower

courts have imposed.[3] From the point of view of Asian Americans, the experiences of these eight states are striking: out of nearly 2,500 judges in those eight states, only *seven judges* are of Asian American descent.[4] A majority of the states with partisan open primary election systems have *no Asian American judges* whatsoever.[5]

Finally, if the lower courts were not going to salvage the conventions statutes by applying *Ayotte*, they should not have judicially enacted new state action in the form of open primaries. While the court of appeals found that it would have been "irresponsible" for the district court to have "left such a gaping hole in the State's electoral scheme," Pet. App. 82, no such gap truly existed in the absence of the stricken statutes. As noted in the petition, Pet. 6, New York's political parties used conventions notwithstanding the absence of a statute mandating them between the years 1846 to 1911. Thus, in the absence of state law directing how political parties were to nominate their candidates for this office, the parties could have chosen through their own internal rules to use conventions or any other method of their choosing.

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[3] Peter D. Webster, *Selection and Retention of Judges: Is There One Best Method?*, 23 Fla. St. U. L. Rev. 1, n.80 (Summer 1995). The states with partisan election systems are Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas, and West Virginia.

[4] American Bar Association, National Database on Diversity in the State Judiciary, http://www.abanet.org/judind/diversity/national.html#1. The ABA analyzed authorized judgeships in the states for the general jurisdiction appellate and trial court bench.

[5] Webster, *supra*, n.81. The states are Alabama, Arkansas, Mississippi, North Carolina, and West Virginia.

ARGUMENT

I. The Lower Courts Failed To Properly Apply *Ayotte* Because Of Their Misreading Of The New York State Election Law

The lower courts failed to heed this Court's direction that federal courts should not "nullify more of the legislature's work than is necessary." *Ayotte, supra,* at 326. Thus, "[i]njunctive relief should be narrowly tailored to fit legal violations." *Waldhill Pub. Corp. v. Landoll Inc,* 43 F.3d 775, 785 (2d Cir. 1994). Indeed, this Court has provided a clear admonition in the election law context that judicial remedies be narrowly tailored to avoid "reject[ing] state policy choices more than was necessary to meet the constitutional violations involved." *Upham v. Seamon*, 456 U.S. 37, 42 (U.S. 1982) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971)); *accord Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 501 n.5 (7th Cir. 1991) ("Any court remedy must be narrowly tailored to include only those measures necessary to cure the effect"). Thus, in cases such as *United States v. Booker*, 543 U.S. 220 (2005), the court took great pains to sever and excise only those portions of Title 18 of the United States Code that rendered the Sentencing Guidelines unconstitutional, while scrupulously leaving in place the applicability of the Guidelines to the federal sentencing scheme. Similarly, the lower courts should have used a like surgical technique by only excising any allegedly offending provision.

The lower courts, however, failed to follow this Court's direction to narrowly tailor its relief by, among other errors, misinterpreting New York's election law as having a so-called default remedy. Pet. App. 82 (discussing the purported default nature of Election Law § 6-110); *id.* at 23 (noting that the district court enjoined conventions

"[b]ased upon the provision of state election law providing for primary elections as the default nominating process. . . ."). Nothing could be further from the truth. New York election law, far from defaulting to an open primary, clearly and unequivocally mandates that party nominations for the office of New York State Supreme Court Justice shall be conducted by party convention. *See* Election Law § 6-106. The statutory provision relied upon by the lower courts, Election Law § 6-110, when read in conjunction with the remainder of the election law, clearly carves this office out of the provision calling for the use of open primaries for other offices.

While the court of appeals claimed that the application of *Ayotte* to salvage judicial conventions from the purported constitutional defects would have been "inviting the District Court to act as a one-person legislature superchamber," Pet. App. 80, this is exactly what the district court did when it directed open primaries. New York repealed the laws providing for open primaries for nomination for New York State Supreme Court Justices in 1921. In a naked act of judicial activism, the district court effectively supplanted the New York legislature's conclusion as to the best method for nominating candidates for this office by directing the return to primaries. The district court's mandate of open primaries is particularly offensive since the selection of manner and timing of the election of state officeholders is a core State's right. Indeed, the district court had no qualms in reducing the number of signatures required by Election Law § 6-136 which would apply to the open primaries the court has imposed as an interim remedy. *See López-Torres v. New York State Bd. of Elecs.*, 2006 WL 929363, No. 04 CV 1129 (JG) (E.D.N.Y. April 7, 2006). But the district court refused to reduce the

number of signatures required for delegate candidates to run which would have addressed one of the central constitutional defects identified by that court. In short, the lower courts should have correctly applied *Ayotte* to eliminate whatever constitutional infirmities they claimed to exist in the statute as its so-called interim remedy rather than directing New York to use open primaries - a selection system it expressly rejected.

II. A Partisan Open Primary Election System Will Likely Disadvantage Asian Americans Because Voting Will Tend To Take Place Along Ethnic Lines

In considering the proper remedy, the lower courts should have considered the impact of their remedy on the diversity of the bench and the associational rights of ethnic minorities, such as Asian Americans. In this regard, the experience of Asian Americans in states with partisan election systems provides strong support for several of the opinions expressed by the petitioners' expert, Dr. Michael Hechter, Emeritus Professor of Political Sociology at the University of Washington. As Dr. Hechter testified, voting in judicial elections tends to take place along ethnic lines:

> [T]he tyranny of the [majority] is always a problem in direct election. There can be persistent underrepresented minorities who can never win the election because there aren't enough of them. . . . There are not enough registered voters ever to prevail in that unit. They will always be consistently out voted.

(Tr. 1223:8-21). Dr. Hechter's conclusions are supported by court decisions concluding that New York politics is characterized by bloc voting and racial polarization. *See, e.g.,*

Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt, 796 F. Supp. 681, 693 (E.D.N.Y. 1992) (African American and Latino voters in the state of New York had established the existence of racial bloc voting); *Butts v. City of New York*, 614 F. Supp. 1527, 1547 (E.D.N.Y. 1985) ("racial and ethnic polarization and bloc voting exists in New York City to a significant degree").

New York State Senator Martin Connor also attested to the strength of bloc voting in New York, testifying that, in an open primary in the Second Judicial District, "you could not elect an Italian American, an Irish American, maybe have a hard time with a Latino." (Tr. 2124:4-2125:4). *See also* Testimony of Dennis Ward (Tr. 343:23-344:1) (stating that, in the Eighth Judicial District, no ethnic minorities would ever win a party nomination in an open primary system).

For Asian Americans, the picture may be even bleaker. As one of the few Asian Americans to win election to the judiciary in Illinois, Judge Sandra Otaka, has stated:

> [I]f African Americans cannot [elect their candidates] at 22% how in the Sam Heck are we going to do it at 4% when you have the name Fujimoto or Svrapi Punja [on the ballot] in Illinois? I was told to put an apostrophe after my O because if I did that, I would have a greater chance at winning county-wide. The bottom line is in Cook County and I imagine other places. . . . if it isn't O'Brien or O'Malley or it isn't Smith or it isn't a name that they have a level of comfort with, then it's going to be a lot more difficult for them to get elected. *Let me tell you, having an Asian name*

> *does not facilitate access to election through the political process* [emphasis added].[6]

The extent of the uphill battle that Asian Americans may face in seeking elective office is further demonstrated by the fact that recent polls show that as many as 30% of Americans believe that Chinese Americans are more loyal to China than they are to the United States, and that 25% of those polled are unsure.[7] As one commentator suggested: "I ask you whether the electorate voting for a candidate who is Chinese American running for judicial office is likely to vote for that candidate if they hold those kind of suspicions?"[8] Thus, by throwing the baby out with the bath water, the lower courts may very well have placed Asian Americans in a worse position than the baby.

The district court recognized that, at a minimum, diversity in the judicial selection process is "a legitimate state interest." Pet. App. 174. Asian Americans are, of course, a significant part of that diversity. The district court, however, did not adequately consider, and failed to protect, that interest in diversity when it imposed its remedy. The district court also failed to take into account the associational rights of minorities, such as Asian Americans, to organize and participate within the political party of their choosing and within that party's chosen

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[6] Judge Otaka was quoted in Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity*, June 2005, at 17.

[7] These figures are presented by Professor Sherrilyn Ifill and appear in Lawyers' Comm. For Civil Rights Under Law, *id.* at 18.

[8] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity*, June 2005, *supra*.

method of nominating judicial candidates – in this case, a process that Dr. Hechter described as logrolling. These associational rights are, themselves, a compelling state interest, which was sufficient to uphold the convention system. Simply put, the district court did not, as it claimed, impose "the least intrusive course" when it directed open primaries. *Id.* at 183-84.

III. District-Wide Judicial Elections In New York State Would Be Prohibitively Expensive

The expense of a partisan open primary system may also adversely affect the prospect of a diverse judiciary. There is every reason to believe that, as stated in the Final Report to the Chief Judge of the State of New York of the Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"), "primaries pose a great risk of attracting substantial increases in partisan spending on New York State judicial campaigns, which, as our research shows, would serve to further undermine confidence in the judiciary."[9] The negative impact of prohibitively expensive district-wide judicial primaries would affect Asian Americans as their population concentration is within the New York City metropolitan area – the most expensive media market in the country.[10]

Indeed, as the plaintiffs themselves have conceded, New York is one of the most expensive states in which to

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[9] Commission to Promote Public Confidence in Judicial Elections, Final Report to the Chief Judge of the State of New York at 3 (Feb. 6, 2006).

[10] *See* SRDS Service Reports (Standard Rate and Data Service).

run a campaign.[11] For example, general election legislative candidates (who run in districts that are often less populous than the areas in which a State Supreme Court Justice would be forced to run) raised a total of more than $50 million in New York State in 2004.[12] Some New York State Senate races have generated spending of more than $3 million per candidate, in one case amounting to more than $51 per vote.[13] Even non-New York City races can cost millions of dollars: the 2005 race for Westchester County Executive cost a total of almost $4 million and the race for Westchester County Clerk cost a total of $673,931.[14]

The expense of campaigning for judicial office may impose disproportionate burdens upon Asian Americans and other members of minority groups. As Geri Palast, Executive Director of Justice at Stake Campaign,[15] has stated, "The high cost of campaigns poses a threat to minority candidates who may not be able to raise as sufficient a war chest to be competitive in these elections."[16] Professor Spencer Overton, a Professor of Journalism at George Washington University School of Law, has

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[11] *See* Declaration of William Lipton in Support of Plaintiffs' Motion for Preliminary Injunctive Relief, dated June 1, 2004 (JA300).

[12] Common Cause, *The $2100 Club: What New York State Political Campaigns Cost, How Much Those Costs are Rising and Who's Footing the Bill* (March 2006) at 5.

[13] *Id.* at 9.

[14] *Id* at 10.

[15] Justice at Stake Campaign is a "nationwide, nonpartisan partnership of more than thirty judicial, legal and citizen organizations" seeking to "campaign for fair and impartial courts." http://www.faircourts.org/contentviewer.asp?breadcrumb=8,284.

[16] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity*, June 2005, *supra*, at 15.

also noted that, although minority group members make up almost 30% of the nation's population, they make up less than 1% of the contributors to federal campaigns.[17]

In fact, over 55% of the contributions by candidates in New York State campaigns during 2002, 2004, and 2005 have come via checks written for more than $2,100 (the federal contribution limit) and, thus, would have been illegal in a federal election.[18] As a result, a comprehensive study of nationwide legislative elections found that "white candidates for contested seats typically spent more than minorities in similar states."[19] As Professor Ira Rohter, an Associate Professor of Political Science at the University of Hawaii at Manoa, said, "People in minority groups typically are lower-income, and they don't have access to the kinds of corporate funding that white people normally would." *Id.*

For this reason, the American Bar Association has supported public financing of judicial elections "to create more opportunities for attorneys of all racial and ethnic backgrounds who do not have . . . the personal or political connectedness to raise large sums of money for elections."[20] However, the remedy imposed by the lower courts does not - and cannot - provide for public financing, and there is no reason to believe that such financing is politically or fiscally feasible in an era of soaring budget deficits.

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[17] *Id.*

[18] Common Cause Report, *supra*, at 3.

[19] *See* Mark Niesse, *Study: Minority Candidates for State Office Often Raise Less Money*, Associated Press, March 29, 2006.

[20] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity*, June 2005, *supra*, at 15 & n.51.

Professor John D. Feerick of Fordham University was quoted saying: "[t]here was no enthusiasm for a primary without public financing and there is no political reality for a vast public financing system." Jennifer Medina, *Albany Is Split Over a Plan to Pick Judges,* New York Times, February 28, 2006. As stated in the Feerick Commission Report at Page11, "without public financing of judicial elections, the judicial nominating convention system should be retained rather than replaced by primary elections."

Thus, for the foreseeable future, if the remedy imposed by the lower courts is not reversed, it will inflict crushing financial burdens upon minority candidates seeking judicial office.

IV. The Lower Courts Erred By Permitting The Enactment Of New State Action In The Form Of Open Primaries After Striking New York's Judicial Convention Statutes In Their Entirety

Assuming that it was proper for the district court to refrain from following *Ayotte* and *Booker* and thereby striking the entire convention statutes, it was improper for the lower courts to impose *new* state action in the form of open primaries. The district court foisted open primaries by baldly stating that it would have been "irresponsible" for it to have "left such a gaping hole in the State's electoral scheme," Pet. App. 82. Its conclusion, however, rests on the flawed assumption that party nominations require state regulation. New York's political parties used nominating conventions between the years 1846 to 1911, notwithstanding the absence of any statute mandating their use. Pet. 6. In the absence of state law directing

parties to nominate their candidates for this office in a specific way, it was the prerogative of parties to create internal rules, which ethnic minorities could have assisted in shaping, to determine the process of nominating candidates for New York State Supreme Court Justice rather than - as we have here - a judicially-imposed method of open primaries.

CONCLUSION

For the foregoing reason, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *ET AL.*,
PETITIONERS

v.

MARGARITA LÓPEZ TORRES, *ET AL.*,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE MID-MANHATTAN BRANCH OF THE NAACP AND THE METROPOLITAN BLACK BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *American Party of Texas* v. *White*, 415 U.S. 767 (1974), this Court held that the Constitution does not "necessarily forbid" party conventions "in preference to" party primaries as the means for political parties to choose their candidates for elective office. In the decision below, the Second Circuit affirmed a ruling requiring New York's political parties to nominate candidates for trial-court judge by party primaries rather than conventions. In so doing, the Second Circuit invalidated the statute governing judicial elections *in its entirety*, even though only certain portions of the statute were deemed unconstitutional.

The question addressed by *amici*, which is subsumed within the question presented by petitioners, is this:

> Did the Second Circuit err in replacing the party-convention statute with a party-primary system rather than severing the offending provisions?

This question was addressed by the courts below and is "not foreign to the parties." *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (considering retroactivity argument raised only by *amici*).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTERESTS OF *AMICI CURIAE* 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 5

I. The Decision Below Conflicts With This Court's Severability Doctrine 6

A. This Court has held that invalid portions of a statute should be severed from the remainder of the statute if the legislature would prefer that result. 6

B. The courts below failed to conduct the severability analysis established by this Court's decisions. 8

II. The Decision Below Will Dilute Minority Representation And Diversity In The New York Judiciary 14

CONCLUSION 15

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES:

Alaska Airlines, Inc. v. *Brock*,
480 U.S. 678 (1987) 7, 11-12

Allen v. *Louisiana*,
103 U.S. 80 (1880) 6

American Party of Texas v. *White*,
415 U.S. 767 (1974) 8, 10

Ayotte v. *Planned Parenthood of Northern New England*,
126 S. Ct. 961 (2006) 2, 6-7, 11-12

Dorchy v. *Kansas*,
264 U.S. 286 (1924) 6

Champlin Refining Co. v. *Corporation Commission of Oklahoma*
286 U.S. 210 (1932) 7

Fallon v. *State Board of Elections*,
380 N.Y.S.2d 355 (N.Y. App. Div. 1976) 10

Lopez Torres v. *New York State Board of Elections*,
411 F. Supp. 2d 212 (E.D.N.Y. 2006) ..... *passim*

Lopez Torres v. *New York State Board of Elections*,
462 F.3d 161 (2d Cir. 2006) 5, 8, 10-12

Minnesota v. *Mille Lacs Band of Chippewa Indians*,
526 U.S. 172 (1999) 7

Norman v. *Reed*,
502 U.S. 279 (1992) 10

Smith v. *Allwright*,
321 U.S. 649 (1944) 13

Storer v. *Brown*,
415 U.S. 724 (1974) 10

Teague v. *Lane*,
489 U.S. 288 (1989) i

Terry v. *Adams*,
345 U.S. 461 (1953) 13

Whitman v. *American Trucking Association*
531 U.S. 457 (2001) 13-14

STATUTES:

N.Y. Election Law § 6-106 ..... 8, 10, 13

N.Y. Election Law § 6-124 9-10

MISCELLANEOUS:

Letters from The Federal Farmer to The Republican No. 3 (Oct. 10, 1787), in 1 *The Debate on the Constitution* 245 7

Publius [Alexander Hamilton], *The Federalist* No. 78 (May 28, 1788), in 2 *The Debate on the Constitution* 467 7-8

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

The severability analysis in the decision below independently warrants this Court's review. As the Court is by now aware, that decision affirmed the invalidation, on First Amendment grounds, of New York State's statutory system for selecting party candidates for judicial elections. The courts below found that system to impose severe burdens on the rights of voters and candidates to have a meaningful choice of candidates, and struck down the statute in its entirety.

Prior to striking down the entire statute, however, the lower courts were required by this Court's long-standing precedent to perform a severability analysis to determine whether the non-defective portions of the statute could be preserved. Had the lower courts performed that analysis, they would have found that the severe burdens they found were traceable to an isolated portion of the statute; that the Legislature had clearly expressed its desire to maintain the current system even without the burdensome provisions; and that a more limited remedy was appropriate.

Review is warranted to preserve, at a minimum, a significant portion of an important state election statute, and to prevent the erosion of this Court's severability jurisprudence. The methodology used below, if followed nationally, would signal an enormous expansion of judicial remedial power of which this Court has repeatedly disapproved.

The severability issue discussed here is of particular concern to *amici curiae* Mid-Manhattan NAACP and Metropolitan Black Bar Association, which support equal pro-

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[1] The parties have consented to the filing of this brief. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel has made a monetary contribution to the preparation or submission of this brief.

tection for African-Americans and other minorities in New York City. Both organizations include sitting black Supreme Court Justices in their membership, and both have representatives on the judicial screening panel which evaluates the merit of candidates for Supreme Court Justice for the First Judicial District, a panel recognized by the district court as "the best in the state." *Lopez Torres* v. *New York State Bd. of Elections*, 411 F. Supp. 2d 212, 231 (E.D.N.Y. 2006). A more detailed description of these organizations can be found in the Appendix.

As organizations with a long history of championing the equal access of blacks and other minorities to elective office in New York, *amici* are strong proponents of New York's judicial convention system. *Amici* are especially proud of the record of minority participation that convention system has produced in New York City.

Amici believe that the decisions below unnecessarily compromise the success of New York's judicial election procedures. Even if portions of the relevant statutes could not be upheld, wholesale rejection of the convention system was inappropriate. As this Court recently made clear, the solution to a constitutional problem should be limited to that problem. *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961, 967 (2006). *Amici* thus urge the Court to review and reverse the decision below (either summarily or through plenary review), to ensure that the remedy in this case does not needlessly sacrifice the diversity benefits of the existing convention system.

STATEMENT

1. In 1921, the people of New York, acting through their duly elected legislators, expressed a clear preference for selecting nominees for the office of New York State Supreme Court Justice through a convention system, rather than direct primary elections.

Over its 85-year history, this convention system has promoted the public welfare by enabling minority candi-

dates to seek and obtain the office of Supreme Court Justice to a degree that direct primary elections could not have. For example, as a result of the convention system, the Supreme Court bench in New York County is currently 44.7 percent minority and 57.9 percent female.[2] Of the 38 Supreme Court justices in New York County, 22 are women, nine are African-American, four are Hispanic, and two are Asian-American.[3] In 2002, the First Judicial District convention nominated:

- Rolando Acosta, a Dominican man;
- Carol Edmead, an African-American woman;
- Troy Webber, an African-American woman;
- Rosalyn Richter, a disabled woman;
- Doris Ling-Cohan, an Asian-American woman; and
- Richard Price, an Orthodox Jewish man.[4]

In the district court, petitioners presented voluminous testimony that a primary system could never achieve the type of diversity that the convention system does, mainly because "[t]he best single determinant of success in a direct election is the size of the candidate's campaign chest," and minorities tend to have disproportionately smaller fundraising resources.[5] One of petitioners' experts testified that without the convention system "you would have a bunch of rich people [elected] to the bench and there would

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[2] Defendants' Corrected Proposed Findings of Fact in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Lopez Torres* v. *New York State Bd. of Elections*, No. 04-cv-1129-JG-SMG (E.D.N.Y. January 26, 2005) (Docket No. 112) ("Defendants' Proposed Findings"), ¶ 241.

[3] *Ibid.*

[4] Defendants' Proposed Findings, ¶ 239.

[5] *Id.* ¶ 247.

be no minorit[ies] sitting up there at all."[6] According to this expert, the existing convention system is "a little fairer to ordinary people."[7] Another expert testified that primaries would result in "an entirely white bench."[8]

2. Although the convention system was democratically enacted and has done much to foster diversity on the bench, the courts below held that New York's judicial election statute violates the First Amendment and cannot be applied in its current form. The district court ruled that New York's judicial convention system imposed severe burdens on the First Amendment rights of voters and candidates to have some meaningful choice in the election of Supreme Court Justices, without the justification of sufficiently compelling state interests. 411 F. Supp. 2d at 243-255. The district court based this ruling primarily on anecdotal evidence of respondents' difficulties in obtaining the nomination of their parties without the support of party leadership. *Id.* at 231-239.

According to the district court, several features of the judicial election statute were responsible for respondents' alleged difficulties, including: (1) the number of assembly districts from which a candidate must field delegates to the conventions; (2) the number of delegates each candidate must run within each assembly district; (3) the number of signatures each candidate must obtain for each delegate within a 37-day period; (4) the prohibition of identifying the candidate each delegate supports on the ballot; and (5) the impracticality of lobbying delegates to change their votes prior to and at the conventions themselves. *Id.* at 217-230.

Based on its finding of a First Amendment violation, the district court enjoined the operation of the entire New

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[6] *Id.* ¶ 248.

[7] *Ibid.*

[8] Defendants' Proposed Findings, ¶ 249.

York judicial convention system, and ordered that direct primary elections be held unless the Legislature can implement a new system before the next election cycle. *Id.* at 255-56. The district court did not examine whether the convention system could still function in the absence of the provisions it found too burdensome, instead voicing its opinion that a primary system was preferable because it "assure[s] that intraparty competition will be resolved in a democratic fashion." *Id.* at 256 (citation omitted).

The Second Circuit affirmed the district court's findings in their entirety. *Lopez Torres* v. *New York State Bd. of Elections*, 462 F.3d 161, 208 (2d Cir. 2006). The Second Circuit acknowledged the obligation of federal courts not to "nullify more of a legislature's work than is necessary." However, the court went on to mischaracterize the invalidation of only the offending provisions as "[t]inkering with the election mechanism" and "rewriting" the statute. *Id.* at 205-206.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition and review the decision below because that decision conflicts with this Court's severability doctrine and threatens to seriously compromise minority representation in the New York judiciary. While this Court has consistently cautioned against invalidating an *entire* statute where only portions of the statute raised constitutional objections, the decision below ignores that warning and affirms an injunction that scraps New York's judicial convention procedure *in toto*. As a result, the decision below imposes upon New York a party-primary system that its Legislature rejected in 1921 and does not want today.

I. The Decision Below Conflicts With This Court's Severability Doctrine.

A. This Court has held that invalid portions of a statute should be severed from the remainder of the statute if the legislature would prefer that result.

For more than 125 years, this Court has recognized that "the same statute may be in part constitutional and in part unconstitutional." *Allen* v. *Louisiana*, 103 U.S. 80, 83 (1880). Thus, "if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Ibid.* Put another way, "[a] statute bad in part is not necessarily void in its entirety," and "[p]rovisions within the legislative power may stand if separable from the bad." *Dorchy* v. *Kansas*, 264 U.S. 286, 289-290 (1924).

This Court applied the same principles just last Term in *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006). The lower courts had held New Hampshire's parental notification statute unconstitutional because it lacked a "health exception" and the judicial bypass it provided was no substitute for such an exception. See *id.* at 965-966. This Court granted certiorari to decide "whether the courts below erred in invalidating the Act *in its entirety* because it lacks an exception for the preservation of pregnant minors' health." *Id.* at 966 (emphasis added).

New Hampshire conceded that its statute could not be applied in a manner that subjects minors to significant health risks, so this Court "turn[ed] to the question of remedy." *Id.* at 967. "Generally speaking," the Court explained, "when confronting a constitutional flaw in a statute, *we try to limit the solution to the problem*. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the re-

mainder intact." *Ibid.* (emphasis added; citations omitted).

As the Court recognized in *Ayotte*, "the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." 126 S. Ct. at 968 (quotations omitted); see *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999) (severability analysis is "essentially an inquiry into legislative intent"). Thus, "[a]fter finding an application or portion of a statute unconstitutional, [a court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte*, 126 S. Ct. at 968.

In asking this question, a court must determine whether "the balance of the legislation is incapable of functioning independently" from the constitutionally defective provisions. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987). "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Refining Co.* v. *Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932).[9]

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[9] The policy reasons for this rule lie at the heart of constitutional separation of powers. The limits on the power of federal courts to issue broad injunctions were one of the few issues upon which both the Federalists and the Anti-Federalists agreed. When the Federalists sought to include the phrase "all cases, in law and equity" in describing the powers of the judiciary in Article III, the Anti-Federalists were concerned that "equity" powers could be abused to give judges unfettered discretion. See Letters from The Federal Farmer to The Republican No. 3 (Oct. 10, 1787), in 1 *The Debate on the Constitution* 245, 273 (Bernard Bailyn ed., 1993). Alexander Hamilton's reply for the Federalists was not to defend broad equity powers, but rather to deny that judicial power was broad in the first instance. See Publius [Alexander Hamilton], *The Federalist* No. 78 (May 28, 1788), in

B. The courts below failed to conduct the severability analysis established by this Court's decisions.

The courts below found only certain aspects of the election statute invalid, so severance was a remedial option. But the district court did not conduct a severability analysis, and the Second Circuit below provided little more. Although the decision below cites *Ayotte*, it does not even purport to examine the legislature's intent with respect to severability. See 462 F.3d at 205-206. Had the courts below undertaken the analysis required by this Court's decisions, they could not have concluded that wholesale rejection of the convention system was appropriate under controlling decisions of this Court.

1. In finding that the judicial election statute impermissibly burdened First Amendment rights, the courts below relied heavily upon the fact that political parties could require candidates to field unreasonably high numbers of delegates within their judicial districts. See 462 F.3d at 192; 411 F. Supp. 2d at 220.

New York's Election Law provides that nominees for Supreme Court Justice shall be chosen by means of a judicial nominating convention. See N.Y. Election Law § 6-106. The statute is plainly constitutional in that respect, for this Court has expressly approved the nominating convention as a means for selecting candidates for elective office. *American Party of Texas* v. *White*, 415 U.S. 767, 781 (1974). The convention prescribed by the New York

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2 *The Debate on the Constitution* 467, 468 (Bernard Bailyn ed., 1993). Thus, the Anti-Federalists opposed the grant of equity powers to federal courts for fear of the unfettered discretion they would lend, and the Federalists considered the judiciary to be capable of "no active resolution whatever." *Ibid.* Between them, there is little support for the broad exercise of judicial power in issuing sweeping injunctions when a more limited remedy is available.

Election Law, however, bears an unusual feature: A candidate seeking the office of Supreme Court Justice must field a slate of convention delegates and alternate convention delegates from each assembly district ("AD") within the judicial district he or she seeks to represent, and the political parties determine how many delegates must be elected from each AD. See N.Y. Election Law § 6-124.

Using this authority, the political parties have devised delegate-allocation formulas yielding unreasonably high numbers of delegates per judicial district. For example, a Democratic candidate running for Supreme Court Justice in the Second Judicial District must field a slate of 124 delegates plus 124 alternate delegates—248 total—across the 24 ADs in that judicial district. Even worse, a Republican candidate running in the Tenth Judicial District must field 185 delegates plus 185 alternate delegates—370 total—across that judicial district's 21 ADs. See 411 F. Supp. 2d at 219.

According to the district court, the statute "make[s] a challenger candidate's effort to elect a majority of delegates more difficult" by "delegating to the major parties the right to determine the number of delegates and alternate delegates" required for nomination. *Id.* at 220. "In the Second Judicial District in 2004, for example, such a challenge would require running approximately 250 candidates across 24 ADs and two counties. The sheer number of people a challenger must recruit to run for the office of delegate and alternate delegate is a significant burden in itself." *Ibid.*

The Second Circuit agreed. "Here, the evidence showed that the political parties' delegate allocation formulae do much more than merely dilute the proportional efficacy of votes *vis a vis* assembly districts within a judicial district. Rather, the evidence showed that a network of restrictive regulations effectively *excludes* qualified candidates and voters from participating in the primary election and subsequent convention, and thus severely

limits voter choice at the general election." 462 F.3d at 192.

2. The other features of the judicial convention system cited below as contributing to an undue burden have previously been found to be constitutionally benign when standing alone. For example, this Court has repeatedly upheld more demanding signature requirements for ballot access than those at issue here—between 9,000 and 24,000 signatures over a 37-day period. See *Norman* v. *Reed*, 502 U.S. 279, 295 (1992) ("our precedents foreclose the argument" that collecting 25,000 signatures from one suburban district is unduly burdensome); *Storer* v. *Brown*, 415 U.S. 724, 740 (1974) ("[s]tanding alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden"); *White*, 415 U.S. at 783 (22,000 signatures in 55 days "does not appear either impossible or impractical").

Similarly, although this Court has not considered New York's practice of not including on the primary ballot the names of the candidate to whom a convention delegate has pledged his support, that practice has been sustained by a New York State court. See *Fallon* v. *State Bd. of Elections*, 380 N.Y.S.2d 355 (N.Y. App. Div. 1976).

None of the other features of New York Election Law §§ 6-106 and 6-124 were even claimed to be unconstitutional, much less found to be so. The requirement of a convention in the first instance, the election of delegates in a primary, their distribution across all ADs, and the use of alternates are all features of candidate selection for other offices in New York that were cited with approval by the district court. 411 F. Supp. 2d at 220.

Without the cumulative effect of the delegate-allocation formulas discussed above, it is unlikely that the courts below would have found that the other features of

the convention system significantly burden First Amendment rights.[10]

3. Once the courts below concluded that certain portions of the election statute created constitutional difficulties, they were required to ask whether "the legislature [would] have preferred what is left of its statute to no statute at all." *Ayotte*, 126 S. Ct. at 968. Under this Court's severability decisions, the courts below were required to strike down only the defective provisions and uphold the remainder unless the latter was "incapable of functioning independently." *Brock*, 480 U.S. at 684.

Remarkably, the courts below failed to undertake any analysis of severability, much less conclude that the benign portions of the convention system could not stand on their own. Without discussing the Legislature's intent at all, the district court simply asserted that temporarily replacing the convention system with a primary system was "the least intrusive course." 411 F. Supp. 2d at 256. And the Court of Appeals declared that excising only the defective provisions of the election statute—as *required* by this Court's severability decisions where the remainder of the statute is salvageable—would be tantamount to "inviting the District Court to act as a one-person legislative superchamber." 462 F.3d at 206.[11]

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[10] The other factual findings below—detailing the anecdotal difficulties of respondents in seeking office—are more accurately described as symptoms, not causes, of the severe burden discussed above. It is hardly surprising that the political bosses respondent Lopez Torres encountered were able to freeze her out of the convention process when her only alternative was to attempt to field a slate of 248 of her own delegates and alternates.

[11] The Court of Appeals also found that the statute was correctly stricken down facially, as opposed to as applied. *Id.* That ruling—which focuses on the injuries suffered by particular plaintiffs versus the public at large—is distinct from the severability question addressed here.

The Court of Appeals seems to have thought that the only alternative to keeping the whole statute intact was to "rewrite" portions of it: "Tinkering with the election mechanism would require that [the] District Court not only rewrite aspects of the judicial election scheme, but also modify provisions, such as the 37-day petition window, that apply to candidates for a variety of offices in New York." *Ibid.* But there was, of course, another option, the option *mandated* by this Court—to invalidate only the offending provisions, without "rewriting" anything. As this Court explained in *Ayotte*, courts should "try not to nullify more of a legislature's work than is necessary." 126 S. Ct. at 967.

The correct analysis would have been to identify exactly which portions of the existing convention system were constitutionally defective—as discussed above, the delegate-allocation formulas—and then to examine whether the statutory convention system could still function without them. See *Brock*, 480 U.S. at 685 ("The more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of [the legislature]").

4. Had the courts below asked the questions this Court requires, and had they considered the evidence of the Legislature's intent, they could not have approved the substitution of a primary system for the convention system, even temporarily.

As the Second Circuit correctly observed, the New York State Legislature enacted the existing judicial convention system in 1921 *to replace* the then-existing direct primaries. 462 F.3d at 171-172. In fact, the current convention system was enacted in response to a specific "concern * * * that bare-knuckled primary elections dissuaded qualified candidates from seeking these significant judicial positions." *Id.* at 171.

Moreover, the New York State Legislature—at the Second Circuit's invitation—submitted an *amicus curiae* brief in this case representing that the district court's sweeping remedy contravened its legislative intent. The Legislature correctly observed that "[i]n enjoining all judicial nominating conventions and ordering the State to use a primary system for selecting candidates for the position of Supreme Court Justice, the district court completely discarded the Legislature's constitutionally permissible choice of a convention system. The Legislature thus has a strong interest in reversal of the district court's decision."[12]

The Legislature's position in this case is not surprising, because the record below strongly suggests that the convention system could function as the Legislature intended even without the defective delegate-allocation formulas. The fact that the Legislature itself did not create the defective formulas, but authorized the political parties to create them,[13] is compelling proof that the Legislature did not see *any* particular delegate-allocation formula—yielding 370 delegates or 37—as an essential feature of judicial conventions. The statute, as written, would require *zero* "rewriting" to excise the offending formulas, because those formulas were not part of the statute to begin with.[14]

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[12] Brief of the New York State Legislature as *Amicus Curiae*, *Lopez Torres* v. *New York State Bd. of Elections*, No. 06-0635 (2d Cir. June 2, 2006), at 1.

[13] See N.Y. Election Law § 6-124 ("The number of delegates and alternates, if any, shall be determined by party rules"). The creation of the delegate-allocation formulas by the parties is nonetheless "state action" for constitutional purposes. See *Terry* v. *Adams*, 345 U.S. 461, 481-482 (1953); *Smith* v. *Allwright*, 321 U.S. 649, 663-664 (1944).

[14] It is axiomatic that a statute delegating rulemaking authority to another entity is not defective simply because the delegee misuses that authority. See *Whitman* v. *American Trucking*

In sum, the Legislature's preference for a convention system over a primary system was strong enough in 1921 that it replaced the latter with the former by statute. And the Legislature's preference for a convention system remains to this day, as evidenced by its argument against the remedy adopted in this case. So the answer to the question whether the Legislature would prefer *some* convention system to *none at all* is clear. In conflict with this Court's precedents, the decision below ignores that clear answer and imposes a primary system contrary to the expressed wishes of the Legislature.

This Court should grant review to ensure that federal courts conduct appropriate severability analyses when considering statutes found to be invalid in part but not in whole.

II. The Decision Below Will Dilute Minority Representation And Diversity In The New York Judiciary.

Review is also warranted because of the practical implications of the decision below. As noted above, because of the convention system, the Supreme Court bench in New York County is highly diverse—so diverse that 44.7 percent of the judges are members of racial minorities and 57.9 percent are female.[15] Moreover, in the district court, petitioners demonstrated that a primary system, because of the fundraising difficulties it creates for women and minorities, could never achieve the type of diversity that the convention system does. Petitioners' experts testified that without the convention system only the rich would be elected to the bench and "there would be no minorit[ies]

Ass'n, 531 U.S. 457, 486 (2001) (Clean Air Act provision upheld despite EPA's misuse of its authority under that provision).

[15] Defendants' Proposed Findings, ¶ 241.

sitting up there at all,"[16] and that primaries would result in "an entirely white bench."[17]

Because it invalidates the entire New York convention election system, the decision below, whether or not it will in fact create "an entirely white bench," virtually guarantees a severe reduction in diversity in the New York judiciary. Given the importance of racial and gender diversity in America's largest city, and given that the convention system has been maintained by the people's representatives precisely to encourage such diversity, that reduction alone is ample reason to grant review.

* * * * *

Under this Court's severability decisions, the courts below should have enjoined the offending provisions of the election statute but preserved the remainder of the convention system. The decision below conflicts with this Court's settled doctrine, threatens the existing diversity of the New York bench, and therefore warrants further review. In fact, because of the clarity of the error in the lower court's severability analysis, that portion of the decision would be appropriate for summary reversal if the Court elects not to grant plenary review of the other issues presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[16] *Id.* ¶ 248.

[17] *Id.* ¶ 249.

Respectfully submitted.

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APPENDIX

APPENDIX

The Mid-Manhattan Branch of the NAACP:

Founded in 1909, the NAACP is the nation's oldest and largest civil rights organization. Its members throughout the United States and the world are the premiere advocates for civil rights in their communities, conducting voter mobilization and monitoring equal opportunity in the public and private sectors. The Mid-Manhattan Branch was founded in 1966.

For over 40 years, the Mid-Manhattan NAACP has been an advocate for all its citizens in the struggle for civil rights and equality. Today, Mid-Manhattan NAACP plays an active role in confronting the gaps and disparities in health care, economics, education funding, criminal justice, and diversity in the courts and the judiciary.

Its efforts continue in voter education, registration and mobilization, as well as youth development and enrichment programs. Today, Mid-Manhattan NAACP has over 600 members, with seven working Committees (Education, Health, Fundraising, Legal Redress, Membership, Political Action and Youth Council).

Mid-Manhattan NAACP's past and present participation on the Supreme and Civil Court Judicial Screening Panels has contributed to greater diversity and minority participation on the Bench. The Branch has five sitting Supreme Court Justices (Hon. Carol L. Edmead, Hon. Milton A. Tingling, Hon. Doris Ling Cohen, Hon. Debra James, and Hon. Paul Fineman) and four sitting Civil Court Judges (Hon. George Silver, Hon. Tanya Kennedy, Hon. Margaret Chan, and Hon. Shari Michels) among its active members. These Judges all reported out of the Judicial Screening Panel process as highly qualified and are representative of the great diversity of New York County.

The Metropolitan Black Bar Association ("MBBA") was created on July 5, 1984 upon the merger of two of the nation's oldest Black bar organizations, the Harlem Lawyers Association and the Bedford Stuyvesant Lawyers Association. For over sixty years, the Harlem Lawyers Association (founded 1921) and the Bedford Stuyvesant Lawyers Association (founded 1933) provided a voice for Black legal professionals and their communities. The MBBA proudly continues the rich legacy of these constituent organizations.

Today, the MBBA is comprised of Black attorneys in both the public and private sectors, as well as judges and other public officials. The MBBA is an affiliate of the National Bar Association and is governed by a 22-member Board of Directors. Its daily operations are managed by its President and six additional elected officers. The purpose of the MBBA is to aid the progress of attorneys of color, and to assist the progress of the legal profession generally. The MBBA serves all of the counties of the Greater New York metropolitan area.

Throughout its 23-year history, MBBA has advocated equal justice and diversity contributing to increasing numbers of minorities in the judiciary. Its founding members include Hon. George Bundy Smith, former Associate Judge on the NYS Court of Appeals; Hon. Fern Fisher, Administrative Judge of the Civil Court of the City of New York; Hon. L. Priscilla Hall, NYS Supreme Court, Kings County; and Hon. Cheryl Chambers, NYS Supreme Court, Kings County.

The MBBA works to expand the breadth and scope of diverse social and legal issues programs for the benefit of the bar and bench as well as the community at large. MBBA has partnered with a number of other organizations to provide such programs, including the Mid-Manhattan Branch of the NAACP, the Asian American Bar Association, the Puerto Rican Bar Association, the Dominican Bar Association, the Jewish Lawyers Guild,

Nigerian Lawyers' Association, New York County Lawyers Association, The Association of the Bar of the City of New York, the American Bar Association, the New York State Bar Association, NAACP Legal Defense Fund, law schools, and other institutions.

The MBBA sponsors lectures and seminars on Tax Amnesty, Haywood Burns Memorial, Affirmative Action, Immigration Law, Attorney Disciplinary Procedures, Criminal Justice, Jury Selection, Entertainment Law, Guardian/Receivership Training, Surrogate Court Practice and Procedure, Labor Law, Estate Planning and other matters. Members may also qualify for scholarships for continuing legal education courses.

Recently, the MBBA called for minority bar associations to jointly screen and interview judicial candidates to increase the strength of diversity. Other initiatives include: In December 2006, the Hon. George Bundy Lecture Series was established to be held annually in conjunction with the Association of the Bar of the City of New York and the Ida B. Wells Barnett Awards is held annually in conjunction with the New York County Lawyers Association and MBBA's expansive CLE program is held in partnership with the ABA and other minority bar groups.

Other activities include programs geared to potential and current law students and mentoring high school students. The Metropolitan Black Bar Association Scholarship Fund, Inc., an independent non-profit corporation, raises funds and grants scholarships to minority law students.

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No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, ET AL.,
Petitioners,

v.

MARGARITA LÓPEZ TORRES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
INTRODUCTION	2
STATEMENT	3
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. NEITHER JUDICIAL CANDIDATES, NOR ANY OTHER ACTORS, FACE A CONSTITUTIONALLY SIGNIFICANT BURDEN AT THE DELEGATE-SELECTION STAGE	10
II. THE SUPPOSED "BURDEN" IDENTIFIED BY THE SECOND CIRCUIT AT THE CONVENTION STAGE HAS NOTHING TO DO WITH THE STATE LAW ITSELF AND IS NOTHING MORE OR LESS THAN PARTY POLITICS IN ACTION	14
A. The Burdens Identified By The Second Circuit Do Not Stem From the Laws Under Review	15
B. There Is Nothing Constitutionally Infirm About The Party Dynamic At The Conventions	17
III. THE SECOND CIRCUIT SHOULD NOT HAVE APPLIED STRICT SCRUTINY	19
CONCLUSION	20

TABLE OF AUTHORITIES

Page

Cases:

American Party of Texas v. *White*, 415 U.S. 767 (1974) 10, 13

Anderson v. *Celebrezze*, 460 U.S. 780 (1983) 11, 16

Bullock v. *Carter*, 405 U.S. 134 (1972) 11, 16, 20

California Democratic Party v. *Jones*, 530 U.S. 567 (2000) 1

Eu v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) 17, 19, 20

Jenness v. *Fortson*, 403 U.S. 431 (1971) 10

Republican Party of Minnesota v. *White*, 536 U.S. 765 (2002) 1, 12

Ripon Society v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert denied*, 424 U.S. 933 (1976) 17, 18

Tashjian v. *Republican Party of Connecticut*, 479 U.S. 208 (1986) 17

Williams v. *Rhodes*, 393 U.S. 23 (1968) 16

Constitutional and Statutory Provisions:

N.Y. Const. art. III, § 5 4

N.Y. Const. art. VI, § 6(a), (b) 4

N.Y. Elec. Law § 6-106 4

N.Y. Elec. Law § 6-124 ..... 4, 5

N.Y. Elec. Law § 6-126 5

N.Y. Elec. Law § 6-134(4) 5

N.Y. Elec. Law § 6-136(2)(i), (3) 5

N.Y. Elec. Law § 6-138 6

TABLE OF AUTHORITIES—Continued

	Page
N.Y. Elec. Law § 6-140	6
N.Y. Elec. Law § 6-142	6
N.Y. Elec. Law § 6-158	4, 5
N.Y. Elec. Law § 6-160(2)	5
N.Y. Elec. Law § 7-116(1)	4
N.Y. Elec. Law § 8-100(1)(c)	4
Rules:	
S. Ct. R. 37.2(a)	2
S. Ct. R. 37.6	1
Other Authorities:	
AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY, AND POLITICAL CHANGE (Harvey L. Schantz ed., 1996)	17
COMMISSION ON THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, THE DEMOCRATIC CHOICE (1968)	18

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Republican National Committee ("RNC") is the national political organization of the Republican Party of the United States.[1] From endorsing candidates, to supporting candidates and party organizations, to sponsoring voter registration, education and turnout programs, the RNC is involved in a wide range of party-building activities.

The RNC promotes candidates in all fifty states for a myriad of state and local offices from the statehouse to the courthouse. The RNC is directly affected by a ruling, such as the ruling of the U.S. Court of Appeals for the Second Circuit in this case, that limits a political party's ability to form a strong leadership group, endorse and support candidates, and generally organize itself as it sees fit to advance the party's interests. The RNC also is directly and adversely affected by a rule of law, such as that announced by the Second Circuit, that ties the constitutionality of state election statutes to the independent actions of party officials. Simply put, the Second Circuit's ruling in this case has the potential to limit severely the ability of the RNC to engage in the kind of core political speech and association that is central to its purpose and that it routinely promotes in other states, including by endorsing candidates for public office.

The RNC has filed briefs *amicus curiae* before this Court in numerous ballot access and other voting rights cases in recent years. *See, e.g., Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002); *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000). Because of the direct impact of the Second Circuit's ruling on the speech and associational rights of political parties, and because of the RNC's experience in supporting candidates for judicial office across the

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the RNC, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

nation, the RNC is well positioned to assist this Court in understanding the issues presented by the petition for certiorari.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.

INTRODUCTION

The RNC respectfully submits that the Second Circuit made three serious errors in its opinion in *Lopez Torres* v. *New York State Board of Elections*, 462 F.3d 161 (2d Cir. 2006) (Pet. App. 1-85). This Court should grant the petition for certiorari because failure to correct these errors could have serious implications for the associational rights of political parties, and could throw into uncertainty the continued constitutionality of an untold number of state and federal election mechanisms.

First, the Second Circuit fundamentally misunderstood New York State's judicial election system. It deemed the system unconstitutionally burdensome because state law makes it difficult for judicial candidates to appeal directly to rank-and-file voters at the nomination stage. Pet. App. 15-17. But the law in question was not *designed* to permit candidates to appeal to rank-and-file voters at the nomination stage, and there is not, and has never been, any constitutional requirement that such interaction be allowed. As a result of this misunderstanding, the court below erred by (1) positing an election scheme that New York State did not adopt, (2) criticizing the State for "burdening" the rights of participants in that non-existent scheme, and (3) relying on this "burden" to strike the State's laws from the books.

Second, the Second Circuit identified several supposed burdens that state law places on associational rights at the convention stage of the New York judicial election process. But these supposed burdens stem not from state law itself, but from the voluntary actions of party officials and voters operating within the ambit of that law. The court's error

presents an opportunity for this Court to clarify that a state law is invalid under its ballot access jurisprudence only if the state law itself, and not the acts of private individuals, offends the Constitution. The contrary rule embraced by the Second Circuit would make the constitutionality, or lack thereof, of statutory texts turn on the (mutable) actions of political party officials over whom the state has little control. Such a rule not only would create lingering and unavoidable uncertainty about the constitutionality of state election laws, but would threaten the established associational freedoms of party members.

Third, the Second Circuit found that the perfectly normal workings of a political party—namely, that party leaders express support for certain candidates and that, in the convention format, those candidates tend to receive the party's nomination—constitute an impermissible burden on First Amendment associational rights. But it cannot be that New York's election law is unconstitutional simply because party leaders wield influence over party decision-makers; if this were so, it could only follow that the election laws of many states—not to mention presidential nominating conventions from the mid-19th century through at least 1968—are unconstitutional.

In sum, the RNC strongly believes in the right of a political party—any party—to organize and operate in the way it believes best serves its beliefs and interests. Absent review by this Court, the decision below will cast into doubt the constitutionality of myriad state election laws and the bedrock associational freedoms of political parties.

STATEMENT

I. THE STRUCTURE OF THE NEW YORK STATE JUDICIAL ELECTION SYSTEM

An understanding of the flaws of the decision below requires a close look at New York's judicial election system.

For the last 85 years, New York State has employed a three-part process for the selection of its trial-court judges

(who are denominated Supreme Court Justices). Pet. App. 10. During the first phase, the rank-and-file voters from each political party select judicial delegates. *Id.* (citing N.Y. Elec. Law §§ 6-106, -124). Next, those delegates attend a convention at which they pick their party's nominees. *Id.* (citing N.Y. Elec. Law §§ 6-106, -124, -158). The judicial candidates so nominated receive a spot on the general election ballot. *Id.* (citing N.Y. Elec. Law § 7-116(1)). Finally, the State holds a general election at which Justices are elected by rank-and-file voters. *Id.* (citing N.Y. Elec. Law § 8-100(1)(c)). These phases are examined in more detail below.

The First Phase. The New York Constitution divides the State, for election purposes, into 12 judicial districts. N.Y. Const. art. VI, § 6(a), (b). Each judicial candidate stands for election in a particular judicial district.

Each judicial district, in turn, includes a number of smaller "assembly districts." *See* N.Y. Const. art. III, § 5. The number of assembly districts in a judicial district ranges from nine to 24. Pet. App. 11. The delegates who will later attend the judicial district's nominating convention are selected at the assembly district level. Each assembly district in a given judicial district elects several delegates and several alternates. So, for example, a given judicial district might have 10 assembly districts, and Republican voters in each assembly district might elect four delegates and four alternates; this would mean 80 people—40 delegates and 40 alternates—would be chosen to attend that judicial district's subsequent convention and select the party's nominees for the available judicial positions in that district.[2]

Any minimally qualified party member may run in his or her assembly district to be selected as a delegate. The requirements to be placed on the ballot are not onerous—indeed, the *only* relevant requirement of note is that the delegate candidate gather 500 valid signatures from party

[2] The district court found that the actual number of delegates varies from 64 to 248 (including alternates) depending on the size of the judicial district. Pet. App. 12.

members residing in his or her assembly district. *Id.* (citing N.Y. Elec. Law §§ 6-134(4), -136(2)(i), (3)). On delegate-selection day in early September, the rank-and-file party members in each assembly district choose their delegates from among those who have gathered signatures and been placed on the ballot. If the number of candidates for delegate from a given party in a given assembly district is less than or equal to the number of available delegate slots for that party in that district, then, as common sense would dictate, the candidates are all deemed elected—the assembly district does not bother to hold a vote in which, by definition, all candidates will win. *See* N.Y. Elec. Law § 6-160(2). For example, if the Republican Party has three delegate slots in a given assembly district, and only three people run for those slots, all three are deemed elected and their names do not appear on the September ballot filled out by Republican voters.

It is important to note that those interested in running for judge have no role in the delegate selection stage. Voters select delegates, not judicial nominees. The delegate candidates are not pledged to a particular judicial candidate. Pet. App. 107. They cannot be, because the convention that the delegates will later attend is required to select multiple nominees, one for each of the judicial slots up for election. In short, the system set up by New York election law envisions no interaction whatsoever between rank-and-file voters and judicial candidates at the delegate-selection stage. Rank-and-file voters are simply entrusted to select proxies for themselves—unaffiliated delegates who later will pick the nominees for their party. The voters are not picking, and under state law have no say in picking, those nominees themselves.

The Second Phase. Political parties hold their judicial nominating conventions in late September, one to two weeks after the judicial delegates are elected. Pet. App. 18 (citing N.Y. Elec. Law §§ 6-124, -126, -158(5)). At the conventions, any delegate may propose the nomination of any judicial candidate. Once this process is complete, the dele-

gates choose as many nominees as there are open Supreme Court positions in that district.

The Third Phase. Finally, the nominees selected at each party's convention appear on the general election ballot in November. Rank-and-file voters may choose from among these nominees, as well as any other candidates who have petitioned their way onto the general election ballot through the gathering of signatures. *See* N.Y. Elec. Law §§ 6-138, -140, -142.

II. THE SECOND CIRCUIT'S FINDINGS AS TO NEW YORK'S JUDICIAL ELECTION SYSTEM

The Second Circuit's holding, pared to its essence, was that judicial candidates' ability to participate in the electoral process (and therefore voters' ability to choose a candidate of their choice) is severely burdened at both the delegate-selection and the convention stage.

The Delegate-Selection Stage. The court first addressed the delegate-selection stage. It recognized that "judicial candidates do not run in the [delegate] election themselves." Pet. App. 11. But the court apparently did not appreciate that this is because the statutory scheme is designed to funnel the judicial candidates' campaigning energies to the subsequent convention stage. Instead, it created a role for judicial candidates at the delegate-selection stage: It wrote that judicial aspirants "have the option of assembling a slate of delegates to run on their behalf, with an eye toward placing those delegates at the judicial nominating convention so that they can cast their votes in favor of the candidate with whom they are affiliated." *Id.*

This conception of the New York scheme drove the rest of the court's analysis. The court seized on the idea that a judicial candidate should (1) assemble a slate of committed delegate candidates, one from every assembly district, who would guarantee to support him; (2) get all of those delegate candidates on the ballot; (3) market himself to rank-and-file party voters in every assembly district; and (4) let those

voters know which delegate candidates were committed to support him at the convention. The court then proceeded to analyze at great length the feasibility of accomplishing such a feat. It found that the difficulty would be severe for several reasons. First, the judicial candidate would have to find a dedicated delegate candidate in each assembly district—between nine and 24 candidates in all. Pet. App. 11. Second, the judicial candidate would have to get them all on the ballot by collecting enough signatures; it calculated that this would require between 9,000 and 24,000 signatures in total, and that dozens of workers would be required to conduct the signature drive. *Id.* at 13-14.[3] Third, the judicial candidate would have to run a public relations campaign in every assembly district to alert the party's rank-and-file voters as to which delegate candidate was supporting him, so that the voters could effectively choose the judicial nominee of their liking by voting for that candidate's "pledged" delegates. *Id.* at 13. All of this, taken together, is too much for any candidate who is not independently wealthy, the court concluded: It cited testimony from judges and judicial candidates to the effect that these "requirements of the process * * * effectively foreclosed their ability to access the [delegate] election phase." *Id.* at 14.

The Convention Stage. Having found a severe burden on judicial candidates at the delegate-selection stage, the Second Circuit then turned its attention to the convention stage. It noted that, during the period between the delegate elections and the convention, "any Supreme Court Justice aspirant * * * theoretically may lobby the delegates for support." *Id.* at 18. It also recognized that any delegate may support, and propose for nomination, any candidate he likes. *See id.* at 18, 28. It nonetheless found a severe burden on candidates at the convention stage, for two reasons.

[3] The court reached this total by using a figure of 1,000 signatures per delegate candidate, on the assumption that the validity of signatures would be challenged and therefore the required 500 per candidate was actually insufficient. *Id.* at 13.

First, it found that "the time frame for lobbying delegates is unrealistically brief," because the approximately two-week period between the delegate election and the convention is insufficient time for a judicial candidate without high-level party support to lobby all of the delegates and alternates in his judicial district. *Id.* at 18. It reached this conclusion despite the fact that most delegate elections are uncontested, and in those cases the identities of the delegates are known—and lobbying may begin—as soon as delegate signature petitions are due in July. *Id.* In other words, the Second Circuit relied on a "unrealistically brief" two-week time frame, even though the more typical time frame for lobbying delegates is at least two months—or four times as long.[4]

Second, the court found that for judicial aspirants without the party leadership's imprimatur, lobbying of delegates is usually fruitless in any event because "delegates do not exercise their own judgment when deciding which candidate to support. Instead, they endorse the choice" of local party leaders. *Id* at 19. Specifically, the court cited testimony to the effect that in at least some judicial districts, (a) the party leadership meets before the convention to select favored candidates, (b) the leadership makes recommendations to the delegates as to which candidates to nominate, and (c) the delegates usually nominate the candidates that the party leadership recommends, even though the leadership issues no explicit commands to that effect. *Id.* at 19-22. The Second Circuit found that this system constituted a "severe" burden on judicial candidates' associational rights, *id.* at 45, even though it recognized that delegates do not have to, and do not always, follow the party leaders' wishes as to whom they should support.[5]

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[4] The court dismissed the importance of this fact by noting that "at least one candidate who attempted to obtain the names of delegates prior to the primary found her effort thwarted by local party officials." *Id.* at 18-19.

[5] For example, the court noted that when respondent Margarita López Torres ran for a Supreme Court nomination, two delegates at the judicial convention attempted to nominate her even though

The Second Circuit concluded that these supposed burdens at the delegate-selection and convention stages constituted "a network of restrictive regulations." *Id.* at 53. It held that the effect of these regulations was to "*exclude*[ ] qualified candidates and voters from participating in the primary election and subsequent convention, and thus severely limit[ ] voter choice at the general election." *Id.* (emphasis in original). Applying strict scrutiny, *id.* at 70, the court affirmed the district court's conclusion that the election laws under review were not narrowly tailored to advance a compelling state interest. *Id.* at 70-76.

SUMMARY OF ARGUMENT

Both of the conclusions underlying the Second Circuit's holding in *Lopez Torres*—first, that judicial candidates are burdened at the delegate-selection stage by the difficulty of assembling a slate of delegates, and second, that judicial candidates are burdened at the convention by the difficulty of successfully lobbying delegates—are severely flawed.

The first conclusion stems from a mistaken understanding of fact: New York's scheme never envisioned that a judicial candidate would attempt to assemble a slate of committed delegates, and therefore criticizing that scheme for making it "difficult" for a candidate to participate in a way that was not intended takes the analysis in the wrong direction.

The second conclusion stems from a misunderstanding of law: The main "burden" identified by the court is that delegates to the nominating conventions often follow the recommendations of party leaders in deciding whom to nominate. But this "burden" has nothing whatsoever to do with state law; it is the result of voluntary choices made by voters throughout the party hierarchy, from rank-and-file party members to judicial delegates to party leaders. Re-

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she had fallen out of favor with the local Democratic Party leadership. *Id.* at 28. And at the 2002 convention, López Torres received 25 delegate votes to her adversary's 66, even though she had not received party leaders' backing. Tr. 827-828.

spondents' attack on the state law was therefore misplaced, as was the Second Circuit's conclusion that that law burdens constitutional rights. Furthermore, parties from time immemorial have established hierarchies, and those hierarchies have supported candidates for office. If these choices are sufficient to render a state election scheme unconstitutional, then vast numbers of state and national election laws are vulnerable to judicial invalidation.

In short, the Second Circuit posited a judicial election system that never existed, and an unrealistic conception of political parties, and then punished New York State for failing to offer what does not exist. This Court should review the Second Circuit's intrusion into both party associational rights and state prerogatives to make clear that this intrusion was unwarranted.

ARGUMENT

I. NEITHER JUDICIAL CANDIDATES, NOR ANY OTHER ACTORS, FACE A CONSTITUTIONALLY SIGNIFICANT BURDEN AT THE DELEGATE-SELECTION STAGE.

Perhaps the most important fact in this case, and one thoroughly obscured in the Second Circuit's opinion, is that anyone who wants to do so can run to be a delegate at the judicial nominating convention. There are no significant barriers to participation in this process, for either voters or candidates—the "candidates" being the delegate candidates.

Delegate candidates may earn a spot on the delegate ballot by simply obtaining 500 signatures from registered party voters. This signature requirement is unobjectionable on its face. *See American Party of Texas* v. *White*, 415 U.S. 767, 789 (1974) (stating that any argument that a 500-signature requirement is objectionable "approaches the frivolous"); *Jenness* v. *Fortson*, 403 U.S. 431, 438, 442 (1971) (approving requirement that minor-party candidates gather signatures from five percent of the number of registered voters at the last election to appear on the general election ballot).

As for the voters, they may cast their vote for any would-be delegate who fulfills the modest signature requirement. None of the sorts of structural barriers that have led this Court to strike down state ballot access laws are present here. *See, e.g., Bullock* v. *Carter*, 405 U.S. 134 (1972) (striking down exorbitant filing fees required to run in primary elections for local offices); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983) (striking down Ohio law barring candidates from a spot on the ballot for U.S. president unless they registered more than seven months in advance). Indeed, this Court's primary concern has been with ballot access restrictions that tend to "'limit the field of candidates from which voters might choose,'" *Celebrezze*, 460 U.S. at 786 (quoting *Bullock*, 405 U.S. at 143); here, there are no such restrictions.

The Second Circuit nonetheless found a severe burden on associational rights at the delegate-selection stage. But it did so by erecting a straw man. The court asked this question: how difficult would it be for a judicial candidate to recruit a full slate of delegate candidates across numerous assembly districts, publicize to all voters those delegate candidates' affiliation, and obtain all the required signatures in every district to get every delegate candidate on the ballot? The answer it gave was that it would be quite difficult. Yet, the reason for that difficulty is precisely that the system was never designed to permit such an approach—a judicial candidate is not *supposed* to campaign directly to primary voters; the judicial candidate is instead supposed to address his campaigning to the unaffiliated delegates at the convention. At the delegate-selection stage, delegate candidates are not supposed to be pledged to any judicial candidate. This was made clear by New York City Board of Elections Commissioner Douglas Kellner, who testified that "the idea that an individual candidate would go out and recruit delegate candidates and run delegates pledged to that candidate in the primary is not the system and it twists the design of the system on its head." Pet. App. 17.[6]

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[6] Commissioner Kellner's testimony is supported by the findings of the district court itself, which noted that with one exception, all

Thus, the Second Circuit's discussion of the "burden" on judicial candidates at the delegate-selection stage misses the point. Judicial candidates have no role at this stage and thus can suffer under no burden. The supposed burden of collecting 24,000 signatures is a fallacy; the signature requirement is 500—*i.e.*, the requirement for an individual resident to run—and it falls on individual delegate candidates, not on judicial candidates. The supposed burden of conducting a campaign across all assembly districts to enlighten rank-and-file voters as to which delegate candidates are in a judicial candidate's pocket also is non-existent. And the supposed burden of recruiting sufficient committed delegates is no burden at all, because state law does not contemplate that a judicial candidate would attempt any such feat.

In short, the Second Circuit found a burden on judicial candidates at the delegate-selection stage by supposing state electoral requirements that do not in fact exist and then finding that it would be difficult to meet those non-existent requirements. The supposedly burdensome "requirements" can be found nowhere in the text of New York's election law. This approach to ballot access questions has no support in this Court's jurisprudence; on the contrary, the cases have focused tightly on the text of the challenged law and the gloss given that text by state court precedent. *See, e.g.*, *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 770-771 (2002). Indeed, it is unsurprising that the Second Circuit's approach is devoid of precedential support. One obviously cannot evaluate the burdens imposed by a state election scheme by reference to the difficulty of performing acts not required or even contemplated by that scheme.

The Second Circuit's misunderstanding on this point seems to stem from its notion that like some primaries (*viz*, the presidential primaries, with their committed delegates), the delegate-selection stage of the New York Supreme Court

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defendants in this case agreed that "the system is not designed for challenger candidates to run their own slates of delegates." Pet. App. 168.

election is designed to give rank-and-file voters a *direct* say in who the nominees of their party will be. *See* Pet. App. 17 (referring to the delegate-selection stage as an "open primary"); *id.* at 53 (stating that part of the basis for plaintiffs' claim is that "the regulations effectively prevent a party member from voting for their preferred candidate"). Proceeding from this premise, the court concluded that (1) rank-and-file voters are not being given the direct say to which they are entitled in picking nominees, and (2) this is a constitutional infirmity, because once New York granted the rank-and-file voters an entitlement to choose judicial nominees, it had to comport with the First Amendment protections that accompany any voting right. *See id.* at 34-35. The problem with this analysis is that the premise is simply incorrect. There is no evidence that the New York statutory scheme is designed to give rank-and-file voters a direct say in choosing nominees; to the contrary, the plain text of the law, and the testimony of Commissioner Kellner, make clear that they are meant to have a say only in choosing unaffiliated delegates. And there is no claim, nor could there be one, that New York is constitutionally *obligated* to give party voters a direct say in choosing nominees. Of course, it could have chosen by statute to give voters such a say; on the other side of the coin, it could have chosen to provide for direct selection of judicial nominees by party leaders alone at closed conventions, without input from elected delegates. *See American Party of Texas*, 415 U.S. at 781 ("It is too plain for argument, and it is not contested here, that the State * * * may insist that intraparty competition be settled before the general election by primary election or by party convention."). It chose a middle ground with features of each, and it was entitled to that choice. The Second Circuit went too far in invalidating that choice—the oft-confirmed, deliberate choice of a sovereign state as to how to structure its judicial elections—and replacing it with another among the range of permissible election structures.

Finally, it is worth emphasizing that the Second Circuit's reliance on this straw man was central to the court's conclusion that the state scheme as a whole severely burdens

associational rights. *See* Pet. App. 46 (stating that the delegate-selection stage "is of central importance to the entire electoral process because it effectively dictates the result of the convention"). The Second Circuit's conclusion cannot stand once this wobbly leg is knocked aside.

II. THE SUPPOSED "BURDEN" IDENTIFIED BY THE SECOND CIRCUIT AT THE CONVENTION STAGE HAS NOTHING TO DO WITH THE STATE LAW ITSELF AND IS NOTHING MORE OR LESS THAN PARTY POLITICS IN ACTION.

Because, viewed correctly, there is no burden on First Amendment rights at the delegate-selection stage of New York's judicial elections, that half of the Second Circuit's justification for striking down the law falls away. The court's decision thus must stand or fall on the supposed burdens it identified at the next stage of the judicial election—the convention itself. In other words, the Second Circuit's holding is reduced to something like the following: "New York's judicial election system is unconstitutional because (a) in a minority of cases, judicial candidates have a relatively short period of time to lobby convention delegates for support, and (b) often, when party leaders tell the delegates whom the leaders think should be nominated, the delegates nominate that person."

The first of these conclusions is quite weak and is not central to the Second Circuit's decision.[7] This brief focuses on the second conclusion—namely, that party-leader influence over convention delegates renders the state's election law unconstitutional. This conclusion is erroneous for at least two reasons. First, the burdens identified by the Second

[7] The conclusion is analytically weak because, as the Second Circuit noted, the two-week lobbying period that caused the court such consternation is the rule only in a minority of cases—those in which the delegate election is contested in the first place. *See* Part I, *supra*. The Second Circuit explicitly acknowledged that the other supposed burden—that of party-leader influence over delegates—is the more important basis for its finding of a severe burden at the convention stage. *See* Pet. App. 19.

Circuit have nothing whatsoever to do with the state laws under review, but instead stem from the decisions of private actors. Second, the behavior of party actors that the court condemns as a severe burden on the First Amendment represents nothing more or less than a permissible, and long-accepted, political party structure; if it is sufficient to render New York's law unconstitutional, then a broad swath of state and federal election systems throughout the country must similarly be unconstitutional.

A. The Burdens Identified By The Second Circuit Do Not Stem From The Laws Under Review.

The Second Circuit found that "a candidate who lacks the support of her party's leadership has no actual opportunity to lobby delegates" because "delegates do not exercise their own judgment when deciding which candidate to support. Instead, they endorse the choice of * * * the local party leadership." Pet. App. 19. The court's objection, broken down to its component elements, is that (1) state party leaders recommend preferred candidates to the convention delegates, and (2) the delegates often accept these recommendations, sometimes with little or no debate.

But if this is the Second Circuit's objection, it does not follow that New York's election law is unconstitutional. The state election rules under review have nothing at all to say about whether party leaders should recommend preferred candidates, or about whether delegates should choose to follow those recommendations. To the contrary, under state law the delegates have the freedom to support whomever they like, and judicial candidates have the freedom to lobby those delegates for support.[8] In short, the Second Circuit

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[8] Relatedly, at the delegate-selection stage, any party member is free to run for delegate. *See* Part I, *supra*. It is true that relatively few rank-and-file party members choose to do so. But that is not because of structural or other obstacles created by law. To the contrary, it appears to be due to a simple lack of interest on the part of the citizenry; this lack of interest creates a lack of "unaffiliated" candidates, and as a result the candidates picked by party insiders

identified nothing at all objectionable about the state law itself; instead, it struck down the law as a response to what it saw as objectionable intraparty behavior.

There is no precedent for the Second Circuit's ruling. This Court has never struck down a state election law on First Amendment grounds based on the way the state's political parties operated within the ambit of the law. Indeed, in every ballot access case relied on by the Second Circuit, this Court's analysis focused on the effect of *the state provisions themselves*—not the effect of another actor—on the franchise. In *Williams* v. *Rhodes*, 393 U.S. 23 (1968), the Court struck down Ohio election provisions because the provisions themselves made it nearly impossible for third parties to get on the presidential ballot. In *Bullock*, 405 U.S. 134, the Court struck down a Texas filing fee because the fee itself made it impossible for non-affluent candidates to run for office. And in *Celebrezze*, 460 U.S. 780, the Court struck down Ohio's early filing deadline because the deadline itself flatly and unnecessarily excluded candidates who made a late decision to run for president.

This is as it should be, for it is the law itself, not the actions of other parties, that is being challenged. If the mere fact of top-heavy party influence could render an otherwise innocuous state law unduly burdensome, then the law could become constitutional, unconstitutional, and then constitutional again as a state party leader's power waxed and waned, even without a change in the actual text under review. Such a rule would defy logic. Perhaps more importantly, it would create an impenetrable constitutional thicket for future courts, which would be duty-bound to judge the constitutionality of state laws based not on their text, but on the private, and potentially shifting behavior of party officials acting within the ambit of those laws. This Court should end such mischief before it begins.

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often win without a fight. But lack of citizen participation is not an unconstitutional burden on First Amendment rights.

B. There is Nothing Constitutionally Infirm About The Party Dynamic At The Conventions.

Even if the Second Circuit could strike down a state law to correct behavior that the state law does not endorse or encourage, it singled out the wrong behavior here: There is nothing constitutionally objectionable about the behavior of state party leaders or delegates at the judicial conventions.

Again, the court's objection is that party leaders recommend preferred candidates to the convention delegates and the delegates often accept these recommendations. But these facts cannot constitute a severe burden on the associational rights of non-favored candidates sufficient to trigger strict scrutiny. It is a *sine qua non* of party politics that party leaders organize the rank-and-file, set goals, and endorse candidates who best advance those goals; indeed, these are recognized associational rights of parties *qua* parties. *See, e.g., Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 216 (1989); *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 224 (1986). If New York's election law is unconstitutional simply because party leaders wield influence over party decision-makers, then the election laws of most states would seem to be vulnerable to the same objection. Furthermore, it would also seem to follow that presidential nominating conventions from the mid-19th century through at least 1972—when pre-pledged delegates became the norm[9]—were all unconstitutional.

In *Ripon Society* v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert denied*, 424 U.S. 933 (1976), the U.S. Court of Appeals for the D.C. Circuit recognized the political reality that the Second Circuit seeks to deny here—

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[9] *See, e.g.*, AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY, AND POLITICAL CHANGE 14 (Harvey L. Schantz ed., 1996) ("National party conventions prior to 1972 were generally under the control of state party leaders. * * * [P]ower and control over delegates were historically held by state party leaders. In 1968, when Hubert Humphrey won the Democratic Party nomination for president, his major strategy was the courtship of party leaders. He did not even enter a single primary.").

namely, that party leaders sometimes have significant say in who will carry the party's colors at the general election. It wrote that the party leadership there in question (the 1970s-vintage Republican National Committee) "makes numerous important political decisions during the periods between national conventions—whose policies are favored in party publications and pronouncements, whose local campaigns are aided by appearances of nationally prominent party members, and so on. The fortunes of presidential hopefuls rise and fall with such decisions." *Id.* at 582. The court noted that "administrative decisions" such as "appointments of subcommittees and their chairmen, delegate seating and accommodations, [and] media coverage" played a "crucial role" in the outcome of the 1968 Democratic Convention. *Id.* at 583 n.51 (citing COMMISSION ON THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, THE DEMOCRATIC CHOICE 40-43 (1968)). It further noted that in many states, as recently as 1968, the selection of delegates to the presidential nominating convention was "made not in a primary election but through a series of local, county, and state caucuses and conventions. * * * [O]ften voter participation [was] so slight as to make the selection process one virtually (or even officially) of appointment by party officials." *Id.* at 584. The *Ripon* court concluded:

> There are a number of respects, then, in which the parties conduct their affairs other than by giving equal attention to the preferences of * * * all party adherents. Perhaps this is not surprising. A party is after all more than a forum for all its adherents' views. It is an organized attempt to see the most important of those views put into practice through control of the levers of government. One party may think that the best way to do this is through a 'strictly democratic' majoritarianism. But another may think it can only be done (let us say) by giving the proven party professional a greater voice than the newcomer. *Which of these approaches is the more efficacious we cannot say, but the latter certainly seems a more accurate description of how political parties oper-*

ate in reality. [*Id.* at 584-585 (emphasis added) (citations omitted).]

The Second Circuit attempts to square its unrealistic view of political parties with that elaborated in *Ripon*, *see* Pet. App. 49-51, but its effort is unavailing.[10]

The Second Circuit, in sum, failed to respect the associational rights enjoyed by parties to endorse and support candidates, and to structure their internal association, as they see fit. *See, e.g., Eu,* 489 U.S. at 216. By invalidating a party's attempt to run party members for delegate slots, and to recommend preferred candidates to those party members and others who subsequently win the delegate slots, the court gave short shrift to the associational rights protected by *Eu* and its progeny. This is especially so given that, as explained above, New York's judicial convention system does not in any event burden the associational rights of voters or candidates. In such a setting, the parties' associational rights should have been respected.

III. THE SECOND CIRCUIT SHOULD NOT HAVE APPLIED STRICT SCRUTINY.

Even if there were cognizable burdens on associational rights in this case, which there are not, the New York statutory scheme would have survived review had the Second Circuit applied the correct level of scrutiny. As the court noted, strict scrutiny only applies in this context where the burdens on associational rights imposed by the law under review are severe. Pet. App. 36 (citing, *inter alia*, *Bullock*, 405 U.S. at 147). Here, properly viewed, the law imposes no severe burdens. The court therefore should have applied "a relaxed standard of review, according to which the restrictions generally are valid so long as they further an important state interest." *Id.*

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[10] *Amicus* agrees with petitioners that the Second Circuit's decision not only creates a circuit split but also conflicts with decisions of this Court, including *American Party of Texas*, *supra*.

Under that standard, several of the justifications put forward by petitioners (*see* Pet. App. 70) should have been sufficient to uphold the New York law. To take just one example: The Second Circuit recognized that "under New York's scheme, parties do retain the right to select a preferred candidate and advocate on her behalf, and we agree that protecting those rights is a compelling state interest." Pet. App. 71 (citing *Eu*, 489 U.S. 214). But it concluded that "the current scheme is not narrowly tailored to achieve that end because there exist several less onerous means by which a state may secure the party's right to guide its own association in this fashion." *Id.* Applying relaxed scrutiny, the law would not be required to meet such a narrow tailoring requirement and would survive review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER ATTORNEY GENERAL OF THE STATE OF NEW YORK AS STATUTORY INTERVENOR

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QUESTION PRESENTED

The Constitution of New York provides for the election of judges for its trial courts of general jurisdiction. New York's Election Law authorizes the selection of nominees for judicial office by political parties, through conventions whose delegates are directly elected by party members. The question presented is whether this system is facially constitutional under the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners are the New York State Board of Elections; Neil W. Kelleher, Douglas Kellner, Helen Moses Donohue, and Evelyn J. Aquila, in their official capacities as Commissioners of the New York State Board of Elections; the New York County Democratic Committee; the New York Republican State Committee; the Associations of New York State Supreme Court Justices in the City and State of New York and Justice David Demarest, individually and as President of the State Association; and Andrew M. Cuomo, Attorney General of the State of New York.

Respondents are Margarita López Torres, Steven Banks, C. Alfred Santillo, John J. Macron, Liliann Motta, John W. Carroll, Philip C. Segal, Susan Loeb, David J. Lansner, and Common Cause/NY.

Pursuant to Supreme Court Rule 35(3), all public officers have been substituted for their predecessors automatically.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	4
STATEMENT	5
A. New York's Election Law	5
1. New York's Current Procedures for Electing Supreme Court Justices	5
2. The History of Nominating Conventions in New York	8
B. Proceedings Below	12
SUMMARY OF ARGUMENT	15

Contents

Page

ARGUMENT 17

I. New York's Statutory Scheme For Nominating Judicial Candidates Is Facially Constitutional Because It Accords All Participants The Constitutional Rights That Attach To Their Roles 17

A. Delegate-Based Conventions Are a Legitimate Method For Nominating Candidates 18

1. Conventions are deeply rooted in the Nation's history 18

2. Conventions serve legitimate state interests 24

B. New York's Judicial Convention System Meets the Requirements of This Court's Election Jurisprudence 27

1. New York neither categorically excludes candidates nor imposes arbitrary obstacles to the ballot when it holds an election 27

2. The features identified as problematic by the lower courts merely distinguish conventions from primaries 29

Contents

Page

3. The electoral process as a whole offers significant checks on persistent abuses of power by party leaders ... 32

II. In Any Event, The Lower Courts Erred In Completely Dispensing With The State's Choice Of A Convention System And Imposing A Direct Primary Instead 33

Conclusion 38

TABLE OF CITED AUTHORITIES

Page

CASES

American Party of Tex. v. White,
415 U.S. 767 (1974) 18, 30

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460 U.S. 780 (1983) 28

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546 U.S. 320 (2006) 34, 35

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405 U.S. 134 (1972) 28

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504 U.S. 428 (1992) 28, 29

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530 U.S. 567 (2000) 28, 31

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Page

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468 U.S. 641 (1984) 34

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536 U.S. 765 (2002) 17

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Page

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Art. I, § 4 17

Art. II, § 1 20

First Amendment ..... *passim*

Fourteenth Amendment ..... i, 12
§ 1 1

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28 U.S.C.
1254(1) 1
2403(b) 13

LOCAL RULES

Supreme Court Rule 35(3) ii

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Mich. Constitution
art. 5, § 21 23
art. 8, § 3 23

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Page

N.Y. Constitution of 1821
art. IV, § 7 9

N.Y. Constitution of 1846
art. VI, § 12 9

N.Y. Constitution
art. III 7
§ 4 7
§ 5 7
art. VI
§ 2 6
§ 4 5-6
§ 6 2
§§ 9-17 6

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..... 10

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..... 9

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§ 3101A 23
§ 3301 23

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§ 21-2-170 23
§ 21-2-172 23
§ 21-2-180 23

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	Page
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§ 43.123	23
§ 44.1	23
Kan. Stat.	
§ 25-301	23
§ 25-302	23
Ky. Rev. Stat. § 118.325	23
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§ 2525	24
§ 2528	24
Mich. Comp. Laws §§ 168.72 - 168.74	23
N.H. Rev. Stat.	
§ 669:17	24
§§ 669:37 - 669:53	24
N.M. Stat. § 1-8.2	23
N.Y. Election Law	
§ 1-104	7, 8, 24
§ 2-106	32
§ 2-112	33
§ 2-120	33
§ 6-104	24
§ 6-106	3, 8, 13, 36
§ 6-108	24
§ 6-110	6, 36
§ 6-124	3, 7, 13

Page

§ 6-126 7
§ 6-136 ..... 7, 28
§ 6-138 8
§ 6-142 ..... 8, 32
§ 6-156 8
§ 6-158 ..... 4, 7, 13
§ 6-160 7
§ 6-164 28
§ 7-104 8
§ 7-108 8
§ 7-116 8
§ 8-100 ..... 7, 8

N.Y. Judiciary Law
§ 140 6
§ 140-a 6

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§ 121 7

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§ 163-96 23
§ 163-98 23

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Page

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William Baringer, *Lincoln's Rise to Power* (1937) ... 22

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-92) is reported at 462 F.3d 161. The opinion of the District Court (Pet. App. 93-185) is reported at 411 F. Supp. 2d 212.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 2006. The petition for a writ of certiorari was filed on November 28, 2006, and was granted on February 20, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

> shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The New York Constitution, Article VI, Section 6, provides in pertinent part:

> a. The state shall be divided into eleven judicial districts. . . .
>
> b. Once every ten years the legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines.
>
> c. The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. The terms of the justices of the supreme court shall be fourteen years from and including the first day of January next after their election.
>
> d. The supreme court is continued. It shall consist of the number of justices of the supreme court including the justices designated to the appellate divisions of the supreme court [and certain other judges]. The legislature may increase . . . [or] decrease the number of justices of the supreme court in any judicial district. . . .

4. New York Election Law § 6-106 provides:

> Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

5. New York Election Law § 6-124 provides:

> A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified

> list and if an equal number of votes were cast for two or more such alternates, the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate, substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

6. New York Election Law § 6-158 provides in pertinent part:

> 5. A judicial district convention shall be held not earlier than the Tuesday following the third Monday in September preceding the general election and not later than the fourth Monday in September preceding such election.

INTRODUCTION

The Attorney General of the State of New York appears as statutory intervenor to defend the constitutionality of the State's election laws. The State of New York has a sovereign interest in determining the method for selecting its judges. For its trial courts of general jurisdiction — the State's Supreme Court — it has chosen an elective system that, in the State's view, balances the public's interest in an independent, qualified, and diverse judiciary with the interests of the electorate in having some say in the selection process. To meet these goals, the statutory scheme provides for the nomination of party candidates for Supreme Court Justice at conventions of elected delegates, followed by a general election at which other candidates also may appear on the ballot.

In declaring New York's election law unconstitutional and ordering nomination by primary, the lower courts improperly substituted their own choice of a candidate-selection method for that chosen by the State. The Legislature deliberately chose the convention system to advance legitimate goals. The District Court found that New York's delegate-based conventions do not always select the nominee that would be chosen by the voters in a direct primary, that it is difficult for a candidate to compete for the nomination by garnering support among the rank-and-file party members, and that the parties may sometimes choose candidates for petty reasons unrelated to their qualifications. But a delegate-based convention is not designed to produce the same result as a direct primary, and the Constitution does not require it to do so. Moreover, no selection system — whether a direct primary, a delegate-based convention, or any other method — can guarantee that nominees will be selected only on the basis of their qualifications and not on the basis of petty or irrelevant considerations. Because New York's convention system affords all participants the constitutional rights that attach to their designated roles, the judgment of the lower courts should be reversed.

STATEMENT

A. New York's Election Law

1. New York's Current Procedures for Electing Supreme Court Justices

New York, like more than thirty other states that elect some or all of their judges, has opted for elected, rather than appointed, judges for its trial courts of general jurisdiction.[1]

1. New York's governor appoints intermediate appellate court judges from the pool of elected Supreme Court Justices. *See* N.Y.

(Cont'd)

New York's Constitution mandates the election of Supreme Court Justices by judicial district. N.Y. Const. art VI, § 6(a), (c). The State is organized into twelve judicial districts, most of which stretch across multiple counties. *See* N.Y. Const. art VI, § 6(a); N.Y. Judiciary Law § 140. New York's Supreme Court Justices are elected to fourteen-year terms at general elections by voters from throughout the judicial districts in which the Justices serve. N.Y. Const. art. VI, § 6(c). The legislature has provided for the election of a total of 328 Supreme Court Justices, ranging from ten in the Sixth Judicial District (consisting of ten counties in central New York) to fifty-two in the Second Judicial District (consisting of Brooklyn and Staten Island).[2] *See* N.Y. Judiciary Law § 140-a.

New York's Election Law governs the method for electing Supreme Court Justices. When vacancies occur in a judicial district, the statute authorizes each political party to nominate candidates for the general election. New York currently recognizes five political parties: the Democratic Party, the Republican Party, the Conservative Party, the

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(Cont'd)
Const. art VI, § 4(c), (d). The governor also appoints the judges of New York's highest court, the Court of Appeals, from a list provided by a judicial nominating commission, with the advice and consent of the State Senate. *See* N.Y. Const. art. VI, § 2(c)-(f).

For its other trial courts, which are limited in jurisdiction by subject matter and geographic extent, New York law provides for either elected or appointed judges. *See* N.Y. Const. art. VI, §§ 9-17. Where elected, candidates for courts of limited jurisdiction are nominated by direct primary. N.Y. Election Law § 6-110.

2. In addition, judges appointed to the Court of Claims by the Governor or to various local courts by the Mayor of New York City may be, and frequently are, designated administratively to sit as Acting Supreme Court Justices.

Independence Party, and the Working Families Party. *See* N.Y. Election Law § 1-104(3) (defining political "party" as any political organization that polled at least 50,000 votes for its candidate at the last gubernatorial election).

The nominating process has two stages: (1) a party primary at which voters select judicial delegates; and (2) a district-wide convention at which the delegates nominate the party's candidates for judicial office. The first stage takes place in early September, when enrolled party members in each assembly district[3] within the overall judicial district elect delegates and alternates delegates to represent them at the convention. N.Y. Election Law §§ 6-124, 6-160, 8-100. An enrolled party member may have his or another's name placed on the primary ballot by collecting five hundred signatures from enrolled party members within the assembly district (or signatures from five percent of the enrolled members, whichever is less) during the petitioning period each spring. *See* N.Y. Election Law § 6-136(2)(i), (3). The number of delegates and alternates allotted to each assembly district is determined by party rule, but must bear substantial proportionality to the votes cast in that assembly district for the party's candidate for governor at the preceding election to the total number of votes cast state-wide for the party's candidate at that election. N.Y. Election Law § 6-124.

Each party then convenes a judicial nominating convention during the third week of September. N.Y. Election Law §§ 6-126, 6-158(6). The party's delegates (or their

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3. Assembly districts are much smaller geographically than judicial districts. They are the political subdivisions New York uses to elect representatives to the State Assembly, the lower house of the Legislature. N.Y. Const. art III, §§ 4, 5. There are 150 assembly districts in New York. N.Y. State Law § 121. Each judicial district encompasses between nine and twenty-four assembly districts. 2d Cir. J.A. 1536.

alternates) from each assembly district attend the convention for the sole purpose of nominating the party's candidates to fill Supreme Court vacancies throughout the judicial district. N.Y. Election Law § 6-106. Depending on the election year and the district, the delegates may nominate as few as one or as many as a dozen judicial candidates at one convention.

In November, the State holds its general election at which voters across the judicial district cast their votes for candidates for the vacant Supreme Court positions. N.Y. Election Law § 8-100(1)(c). The parties' certified nominees automatically appear on the general election ballot. N.Y. Election Law §§ 6-156, 7-104(5), and 7-116. The Election Law provides two alternative means of access to the general election ballot. First, any independent body[4] or individual can have a qualified judicial candidate's name placed on the ballot by gathering 3,500 signatures (4,000 in New York City), or signatures from five percent of the number of votes cast for governor in the prior election, whichever is less. N.Y. Election Law §§ 6-138, 6-142(2). Individuals may also have votes cast on their behalf by write-in ballot. N.Y. Election Law §§ 7-104(7), 7-108(8). Registered voters within the judicial district have the opportunity to cast votes for as many candidates as there are vacancies for the office of Supreme Court Justice within their district. *See* N.Y. Election Law § 7-104(4)(c).

2. The History of Nominating Conventions in New York

New York's current system for judicial nominations is no accident. Rather, it is a deliberate response to the perceived advantages and disadvantages of the alternatives the State has tried.

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4. New York defines "independent body" as any organization or group of voters that nominates candidates for elective office but is not a political "party." N.Y. Election Law § 1-104(12).

Before 1846, New York's governor appointed the State's judicial officers. N.Y. Const. of 1821, art. IV, § 7. Riding the wave of Jacksonian populism, in 1846, New York amended its Constitution to become only the second state to provide for the popular election of its judges. N.Y. Const. of 1846, art. VI, § 12. At first, the political parties nominated their candidates for Supreme Court Justice, as they did for other elective offices, at party caucuses or "primary meetings" attended by both party activists and rank-and-file members. Near the turn of the twentieth century, the Legislature took note of the abuses that frequently occurred at these contentious affairs, and launched a series of investigations into alternative nominating methods. *See, e.g.*, N.Y. State Assembly, *Report of the Select Committee on the Subject of Primary Elections in the State of New York*, Assemb. Doc. No. 96, at 1-5 (1882). Some argued in favor of direct party primaries, while others advocated for nomination by delegates at party conventions. *See* N.Y. State Senate, *Report of the Joint Committee of the Senate and Assembly of the State of New York, Appointed to Investigate Primary and Election Laws of This and Other States*, S. Doc. No. 26 (1910) (containing extensive testimony and other evidence about the relative merits and demerits of each nominating system).

In 1911, the New York Legislature — joining a growing trend nationally — mandated direct primaries for nominating candidates for Supreme Court Justices as well as for certain other state-wide offices. Act of Oct. 18, 1911, ch. 891, 1911 N.Y. Laws 2657. Before long, however, abuses in the direct primary system surfaced. A 1917 New York Times editorial condemned the direct primary as "device capable of astute and successful secret manipulation by professionals." Editorial, N.Y. Times, May 1, 1917, at 12. The Republican candidate for governor in 1920 campaigned against direct primaries, decrying them as "a delusion and a snare, a fraud" that "offered the opportunity for two things, for the

demagogue and the man with money, and I am in favor of restoring, as far as the election of State and judicial candidates is concerned, a representative party system." *Miller Declares Primary a Fraud, Promises If Elected to Try to End It in State and Judicial Nominations*, N.Y. Times, Oct. 23, 1920, at 4.

There soon were numerous legislative proposals that called for replacing direct primaries with nominating conventions where representative delegates would choose the parties' nominees. Legislative sponsors of these bills described the experiment with direct primaries as an "abject failure." *See Urge Modification of Primary Law*, N.Y. Times, Mar. 3, 1919, at 5. The sponsors observed that only a small portion of the electorate took note of direct primaries, and those who did seldom knew anything about the candidates they voted for. *Id.* As a result, the sponsors argued, only men of great wealth or backing by party leaders could be nominated. *Id.* The Committees of the New York State and City Bar Associations and numerous other organizations joined the drumbeat to abolish direct primaries for judicial candidates. *See Albany Bills Approved*, N.Y. Times, Mar. 18, 1918, at 19; *New York Bar Finds Bad Bills in Albany*, N.Y. Times, Feb. 21, 1919, at 8.

In 1921, the New York Legislature, agreeing that its brief experiment with direct primary elections should be abandoned, enacted legislation to replace it with a representative convention system. Act of May 2, 1921, ch. 479, 1921 N.Y. Laws 1451. The 1921 law provided for state-wide conventions to nominate certain state officers and judicial-district-wide conventions to nominate Supreme Court Justices, with delegates to these conventions chosen by a majority vote in each assembly district.

The special committee of the State Senate proposing the 1921 legislation described the nominating convention as an "assemblage of each political party in the State, that each may make manifest, after consultation and deliberation, what its aims are." N.Y. State Senate, *Report of the Special Committee of Senate on Primary Law Submitted with Bill to Establish State Wide Judicial Conventions*, S. Doc. No. 34, at 2 (1918). After giving "careful consideration to the question of state primaries" and the attendant costs of mounting elections, the special committee found it "essential" to reestablish state-wide conventions and conventions for the nomination of Justices of the Supreme Court. *Id.* at 3. The committee noted that conventions are particularly appropriate for nominating judicial candidates, where "[it] is inherent in the functions of the judicial office that the office should seek the man, and not the man the office." *Id.*

Since 1921, the issues of whether to nominate judicial candidates by convention or direct primary and whether to have an elected judiciary at all have been vigorously debated in New York. *See, e.g.*, 9 N.Y. State Constitutional Convention Committee Report, *Problems Relating to Judicial Administration and Organization* 997-1002 (1938). At New York's 1967 Constitutional Convention, delegates again rejected efforts to replace conventions with direct primaries for nominating candidates to the Supreme Court bench. *See Minority Report of Committee on the Judiciary* 3 (1967), *in* 11 *Proceedings of the New York State Constitutional Convention of 1967*, Doc. No. 50-A. Most recently, the Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission") issued a report at the behest of New York's Chief Judge concluding that the convention system is preferable to candidate selection by direct primary, largely because primaries pose "a great risk of attracting substantial increases in partisan spending on

New York State judicial campaigns, which, as our research clearly shows, would serve to further undermine confidence in the judiciary." Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* 3 (Feb. 6, 2006) ("Feerick Commission Report"), *available at* http://law.fordham.edu/commission/judicialelections/images/jud-finreport.pdf. Thus far, the State has chosen to retain the judicial nominating system that the New York Legislature enacted in 1921.

B. Proceedings Below

Plaintiffs — individual voters and aspiring judicial candidates — commenced this action in March 2004 against the New York State Board of Elections and its members, challenging as unconstitutional the method by which New York State's Supreme Court Justices are selected. Specifically, plaintiffs asserted that New York's "closed judicial convention system denies voters their right to choose among their parties' candidates . . . by placing severe and unjustified burdens on candidates seeking to challenge candidates who are backed by local Democratic or Republican Party leaders." 2d Cir. J.A. 1, 2. They sought a declaration that New York's current statutory system violates the First and Fourteenth Amendments of the United States Constitution, both "facially and as applied." 2d Cir. J.A. 35. Additionally, plaintiffs asked the court for an injunction imposing a direct primary system in which candidates would petition for primary ballot access by obtaining a set number of signatures, unless the State's Legislature were to amend its laws within ninety days to reform the convention system. 2d Cir. J.A. 35.

After the State Board of Elections answered, 2d Cir. J.A. 41-44, plaintiffs moved for a preliminary injunction seeking to enjoin the Board from enforcing three provisions

of the State's election law governing the parties' nomination of candidates for Supreme Court Justice: § 6-106, which provides that party nominations for the office of Supreme Court Justice shall be made by judicial convention; § 6-124, which provides for delegate selection by primary; and § 6-158, which provides for judicial conventions to be held in the third week of September preceding the general election.

The Attorney General of the State of New York appeared as statutory intervenor in defense of the Election Law provisions. *See* 28 U.S.C. § 2403(b). Additionally, the New York County Democratic Committee, the New York State Republican Committee, the Association of Justices of the Supreme Court of the State of New York, the Association of Justices of the Supreme Court of the City of New York, and Justice David Demarest, individually and as President of the State Association, intervened as defendants.

From September through November 2004, the District Court held an evidentiary hearing on the motion for a preliminary injunction. The hearing spanned thirteen days, during which the court heard testimony from fourteen witnesses and received thousands of pages of documentary evidence. This evidence focused on how the nomination process actually worked in New York's First and Second Judicial Districts — located in New York City — over the past several decades, although there was also some evidence regarding party nominations in the upstate judicial districts.

On January 27, 2006, the District Court issued a preliminary injunction against the challenged provisions of the Election Law, concluding that plaintiffs were likely to succeed on the merits of their claim that New York's judicial convention system violates the First Amendment. Pet. App. 95. Borrowing from the test applicable to challenges by candidates to obstacles to the general election ballot

established in *Storer v. Brown*, 415 U.S. 724, 742 (1974), the District Court asked the following questions: Could a reasonably diligent challenger candidate for Supreme Court Justice succeed in getting her own delegates on the ballot for each assembly district? And if not, could she succeed in lobbying the elected delegates? Pet. App. 167. The District Court answered the first question in the negative, finding that as a practical matter, a judicial candidate cannot obtain enough signatures in enough assembly districts to run a slate of delegates pledged to that candidate. Pet. App. 167. Moreover, the court concluded that at the convention, the delegates do not independently evaluate candidates for Supreme Court Justice but instead follow the wishes of their party leaders. Pet. App. 169. Thus, the District Court held, the burdens on the judicial candidates' access to the nomination process are "severe." Pet. App. 172. Applying strict scrutiny, the District Court found that the statutory scheme is not narrowly tailored to achieve any compelling state interests. Pet. App. 172-183.

Although it purported to order only interim relief, the District Court imposed a sweeping permanent remedy that enjoined operation of the State's laws providing for delegate selection and judicial conventions. The court ordered that the convention system be replaced by direct primary elections until the New York Legislature enacts a new method for selecting Supreme Court Justices. Pet. App. 183-185.

The United States Court of Appeals for the Second Circuit affirmed. Pet. App. 6. The Court of Appeals agreed with the District Court that aspiring candidates have a constitutional right of access to nomination by their political party, and that voters have a corresponding right to vote for the candidate of their choice. Pet. App. 37-44. Notwithstanding the meaningful access candidates may have to the general election ballot, Pet. App. 54-57, the court held

that the State's provisions severely limit reasonably diligent candidates' access to nomination by their own party and are therefore subject to strict scrutiny. *Id.* at 57-70.

The Court of Appeals rejected the State's rationales for choosing the representative convention system over direct primaries. While agreeing that the State has a compelling interest in protecting the parties' right to select and advocate on behalf of their preferred candidates, the court held that the State's scheme is not narrowly tailored to achieve that end. Pet. App. 71-72. The court also held that the convention system was not narrowly tailored to promote geographic and racial diversity or judicial independence, concluding that less burdensome means exist to serve this end. Pet. App. 73-76. Finally, the Court of Appeals held that the District Court had acted within its discretion in ordering the substitution of a direct primary for the convention-based nominating system. Pet. App. 79-84.

SUMMARY OF ARGUMENT

1. New York's statutory election scheme, under which parties nominate their candidates for the office of Supreme Court Justice by elected delegates at district-wide conventions, is facially valid. Delegate-based conventions as an alternative to direct primaries are firmly rooted in this Nation's history and remain in use in many places today. Conventions allow voters who may not be fully informed about candidates' qualifications to rely on a small set of delegates who can educate themselves and coordinate their efforts to nominate the best slate of candidates. Because of their long pedigree and unquestioned legitimacy, delegate-based conventions are constitutionally acceptable.

Nothing about New York's convention system in particular raises constitutional questions. The State does not

categorically exclude anyone from the nomination process, and it makes it easy for any interested voter to run as a delegate or to vote for any candidate in the general election. That is all this Court's precedent demands. The features the lower courts found troubling — such as that candidates who lack the support of party leaders may not capture the nomination even though they enjoy support among rank-and-file members — simply reflect that this is a convention system, not a direct primary. It is neither surprising nor problematic that the results of a convention may differ from those of a primary. That is precisely why States choose to have conventions in the first place. And if party leaders abuse their power to nominate candidates, rank-and-file members may either abandon the parties' nominees in the general election or replace the party leadership.

To be sure, there may be policy-based arguments for changing aspects of the convention system or even replacing it with direct primaries. But these are not constitutional arguments, and so the choice ought to be left to the State Legislature.

2. Even if the current system were constitutionally infirm, the remedy imposed by the lower courts would be improper. The courts should have left the choice of remedy to the State Legislature in the first instance. And if an immediate judicial remedy were needed, the courts should have crafted a more narrowly tailored injunction — one that preserved the State's reliance on delegate-based conventions but redressed the particular constitutional problems identified by the courts.

ARGUMENT

I. New York's Statutory Scheme For Nominating Judicial Candidates Is Facially Constitutional Because It Accords All Participants The Constitutional Rights That Attach To Their Roles

Although nothing in the Constitution requires a State to provide for the popular election of its judges, *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002), New York has decided to use elections to select certain of its judges — namely, the Justices of the Supreme Court, which is the trial court of general jurisdiction. Having chosen to "tap the energy and legitimizing power of the democratic process," the State "must accord the participants in that process . . . the First Amendment rights that attach to their roles." *Id.* at 788 (quotation marks omitted).

But the State retains considerable discretion to shape its electoral process to suit its legitimate interests. "The Constitution grants States 'broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by the state control over the election process for state offices.'" *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Thus, the States have legitimately developed "comprehensive, and in many respects complex, election codes" that regulate, among other things, "the selection and qualification of candidates." *Id.*

A. Delegate-Based Conventions Are a Legitimate Method For Nominating Candidates.

1. Conventions are deeply rooted in the Nation's history.

This Court has already acknowledged that "[i]t is too plain for argument . . . that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election *or by party convention*." *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (emphasis added). The observation that a State may mandate nominating conventions is not surprising, because conventions have a long and prominent history in this country.

Conventions — and their precursors, caucuses — were held even before the constitutional convention in 1787. In early America, self-appointed members of political organizations would hold caucuses to nominate candidates for local office. *See* Hugh A. Bone, *American Politics and the Party System* 261 (1971); Theodore W. Cousens, *Politics and Political Organizations in America* 340-43 (1942); V.O. Key, *Politics, Parties and Pressure Groups* 400-04 (1952).

According to historian Robert J. Dinkin:

> While small groups of gentleman met to set up candidates in many rural communities, residents of some of the rapidly growing towns and cities began establishing a larger and more formalized nominating body, which was increasingly referred to as a caucus. By the eighteenth century, conflicting interests had begun to emerge in many

> urban areas. As these divisions occurred, it became apparent that the existing government could no longer satisfy all segments of the community. Soon, men holding a particular set of beliefs and values felt it necessary to organize for the purpose of selecting individuals who would best promote the interests of their own group.

Robert J. Dinkin, *Voting in Provincial America: A Study of Elections in the Thirteen Colonies, 1689-1776*, at 75-76 (1977). During the Revolutionary War and the Nation's earliest years, the Federalists, anti-Federalists, and other factions used caucuses in one form or another to nominate their candidates for public office. *See* Robert J. Dinkin, *Voting in Revolutionary America: A Study of Elections in the Original Thirteen States, 1776-1789*, at 57-72 (1982).

But caucuses proved ill-suited for choosing candidates in growing urban population centers and, given the transportation and communication limitations of the time, for state-wide or national office. As a result, the nominating convention took root as the preferred method for selecting candidates for certain offices. Bone, *supra*, at 261-63; Key, *supra*, at 404-08. The theory was that well-informed representatives would convene to debate, compromise, and ultimately nominate candidates, and to determine the organization's positions on issues:

> In theory at least, the convention possessed outstanding merit. The stairway of conventions from the local to the state and eventually to the national level provided a hierarchy of deliberative bodies to consider candidates and issues. Here divisive interests within the counties and state could be compromised and ironed out. The

> convention offered a vehicle to reduce extreme factionalism and to promote unity. Nominations would more likely include able but not widely known men who remained in political oblivion under the caucus system. The delegate convention appeared to offer an excellent example of representative democracy.

Bone, *supra*, at 262.

The notion of a representative convention was, of course, the paradigm for the Constitutional Convention in 1787. And it is the one the framers of the Constitution chose for electing the President and Vice President of the United States — the Electoral College. *See* U.S. Const. art. II, § 1. The framers perceived no constitutional infirmity in having the States use methods other than the popular vote to choose their electors, who were not bound to vote for any particular candidate, to represent them in the Electoral College:

> The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

McPherson v. Blacker, 146 U.S. 1, 27 (1892); *see also id.* at 36 (upholding the constitutionality of the method for choosing electors even if it resulted in electors who did not "exercise a reasonable independence and fair judgment" in Electoral College proceedings).

As the Nation's political parties took hold in the early decades of the nineteenth century, they too turned to nominating conventions to select their candidates for public office. In 1804, Republicans in both New Jersey and Delaware held the first state-wide nominating conventions, where delegates elected by party voters nominated the parties' candidates. Cousens, *supra*, at 343. In 1824, Republican leaders called on the other mid-Atlantic states to use state-wide conventions to choose the party's candidates for governor, and the state convention in its pure form became permanently established in New York, Pennsylvania, and Rhode Island. *Id.* By the end of the decade, the party nominating conventions for state-wide office became widespread. Bone, *supra*, at 262-263.

Before long, the Nation's political parties also began using nominating conventions to choose their candidates for national office. The first national convention of a political party was held in 1830, when ninety-six Anti-Masonic Party delegates from ten states met in Philadelphia. Cousens, *supra*, at 345. Then in 1832, President Andrew Jackson, campaigning vigorously against the prevailing legislative caucus method for choosing such candidates, turned to the national convention to help nominate his choice for Vice President. *Id.* at 346; Bone, *supra*, at 287. During the next few elections, the Whigs and Democrats used the national convention to ratify, if not choose, their candidate for President, and to try to agree on their choice for Vice President. By mid-century, national conventions had "reached their full stature." Bone, *supra*, at 287; Cousens, *supra*, at 347. The parties' use of national conventions as the dominant means of nominating their presidential candidates continued for more than one hundred years. Leon D. Epstein, *Political Parties in the American Mold* 88-108 (1986).

Perhaps the most well-known example of nomination by convention, and one that illustrates its best features, is the Republican Party's use of that method to propel Abraham Lincoln to the presidency in 1860. First in county conventions, and then at the state convention, Republican Party leaders in Illinois sifted through a wide range of contenders before settling on the relatively unknown candidate from their own state. Again through negotiations at the national convention, the national party settled on Lincoln as its compromise candidate after William Seward and Salmon Chase proved too divisive. *See* William Baringer, *Lincoln's Rise to Power* 188-295 (1937); Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 237-256 (2005).

Throughout the twentieth century, the major parties continued to use national conventions to nominate their candidates for President. As of 1971, the state party committees used three methods to select delegates — selection by party committee, selection at a party convention, and party primaries — and more delegates were chosen by party convention than party primaries. Bone, *supra*, at 289-90; *see also* Epstein, *supra*, at 97. The delegates were generally not bound to any particular candidate and were permitted to take part in the give-and-take inherent in the convention. *Id.* During the 2000 presidential elections, a substantial number of States — including Alaska, Delaware, Hawaii, Iowa, Minnesota, Nevada, South Carolina, Utah, Vermont, and Wyoming — authorized parties to select delegates to the national nominating convention according to party rules, and to nominate their presidential and vice presidential candidates at a state-wide caucus or convention without regard to primaries. *See Nomination and Election of the President and Vice President of the United States, 2000*, S. Doc. No. 106-16, at 233-307 (2000). And in some States where presidential preference primaries were held — including Alabama, Illinois, Maryland, Montana, and West Virginia — the results of those primaries did not bind the parties' delegates at the national convention. *See id.*

Although mandatory direct primary laws became increasingly prevalent through the twentieth century, the direct primary continues to be only one of an array of candidate-selection methods authorized by the States. Many States still authorize or require parties to use either conventions or caucuses to nominate candidates for some of the States' elective offices.[5] For example, in both Indiana and South Dakota, political parties use state-wide conventions to nominate their candidates for a wide range of offices — lieutenant governor, secretary of state, attorney general, state auditor, treasurer, and superintendent of public education. Ind. Code §§ 3-8-4-2; S.D. Codified Laws § 12-5-21. Similarly, in Michigan, the parties use state-wide conventions to nominate candidates for lieutenant governor, secretary of state, attorney general, and members of the state board of education. Mich. Const. art. 5, § 21; *id.* art 8, § 3; Mich. Comp. Laws §§ 168.72-.74; *see also* Iowa Code § 43.123 (parties choose lieutenant governor at state-wide conventions).

Virginia and some other southern states give the major political parties the option to use the convention or primary method to nominate candidates for United States Senate and state-wide office, as well as for a variety of county and local offices. Va. Code §§ 24.2-508, 24.2-509; S.C. Code §§ 7-11-10, 7-11-30.[6] Moreover, some States still permit parties to use

5. For a comprehensive, though already outdated, treatment of the States' election laws pertaining to candidate nomination, see Alexander J. Bott, *Handbook of United States Election Laws and Practices* 96-138, 172-175 (1990).

6. In many — if not in most — States, minor or new parties are authorized or required to nominate their candidates at conventions. *E.g.*, Del. Code tit. 15, §§ 3101A, 3301; Ga. Code §§ 21-2-170, 21-2-172, 21-2-180; Iowa Code § 44.1; Kan. Stat. §§ 25-301, 25-302; Ky. Rev. Stat. § 118.325; N.M. Stat. § 1-8.2; N.C. Gen. Stat. §§ 163-96, 163-98; Or. Rev. Stat. §§ 249.732 -.737; Tex. Elec. Code §§ 172.001-.002; 181.001-.005; Wash. Rev. Code § 29A.20.121; W. Va. Code § 3-5-22; Wyo. Stat. § 22-4-303.

(Cont'd)

the caucus method to nominate candidates for certain local offices. *E.g.*, Maine Rev. Stat. tit. 30A, §§ 2525, 2528(4); N.H. Rev. Stat. §§ 669:17; 669:37-:53; Wis. Stat. § 8.05. New York, for example, permits its political parties to use caucuses to nominate their candidates for town offices in some counties. N.Y. Election Law §§ 1-104(28), 6-108.

In view of this history, conventions cannot be thought constitutionally suspect. *Cf. Storer*, 415 U.S. at 730 ("It is very unlikely that . . . a large portion of the state election laws would fail to pass muster under our cases . . . ."). Although conventions prevent voters from choosing their parties' nominees directly, representative democracy — which is, after all, embodied in the Constitution itself — is a legitimate political structure.

2. Conventions serve legitimate state interests.

States choose delegate-based conventions because they temper some of the characteristics of direct elections that might be thought undesirable, particularly for judicial offices. Direct elections work best when the electorate is fully informed about the qualifications of the candidates. That is most likely to occur in campaigns for prominent offices, such as President or Governor, because those campaigns are likely to attract heavy media coverage. For less visible offices — and particularly for offices that demand specialized qualifications, such as judicial positions — the general electorate is not always as informed. As this Court has observed:

(Cont'd)

In a variation on the theme, some states — including New York — provide for pre-primary conventions at which political party leaders can designate or endorse their preferred candidates before the primary elections are held. *E.g.*, N.Y. Election Law § 6-104; Conn. Gen. Stat. §§ 9-382 to -390; N.D. Cent. Code §§ 16.1-11-06 to -11.

> Whereas the electorate would be expected to discover if their governor or state legislator were not performing adequately and vote the official out of office, the same may not be true of judges. Most voters never observe state judges in action, nor read judicial opinions.

Gregory v. Ashcroft, 501 U.S. 452, 472 (1991).

This drawback might be thought to be more severe in primaries than in general elections. In the general election, the party itself it can work to educate voters about its nominees' relative qualifications compared to their opponents'. In the primary, however, the party has not yet settled on its standard-bearers. The candidates must raise money themselves and develop their own campaign strategies to spread their messages. Primaries thus may further politicize the selection process for offices. This result may be especially undesirable for judicial offices, because it may jeopardize the candidates' actual and perceived independence.

Direct primary elections also make it difficult for a party to nominate a coordinated slate of candidates when it is filling more than one vacancy at once, as is often the case with Supreme Court Justices. A party might think it desirable, for example, to present a geographically diverse slate for the general election, so as to attract votes from across the district. Because there are so many voters in a primary, it is virtually impossible for the voters to work together to assemble a balanced slate.

Delegate-based conventions offer an alternative that mitigates these concerns. Rather than choosing the nominees directly, the rank-and-file party members elect representatives to make the choice for them. These delegates are often party

activists who are familiar with the values of the party membership as a whole and who can educate themselves about the qualifications of the candidates and the duties of specialized offices. And because there are relatively few delegates elected, they can coordinate their efforts with each other. That allows them, if they choose, to settle on a balanced slate of nominees exhibiting geographic or other diversity.

New York's experiences illustrate the advantages that conventions may offer over direct primaries. After New York's experiment with the primary system nearly a century ago, the State Legislature, the press, and leading bar associations decried the primary system as a failure that jeopardized the independence of the judiciary. It was observed that because candidates needed to raise large sums of money for the primary, only the wealthy and demagogues could get elected. Because voters had little knowledge about the candidates, they often voted solely on name recognition. These concerns precipitated the quick return to the convention system.

As the Feerick Commission reported to New York's Chief Judge last year, these concerns are no less apt today. The Feerick Commission's study found major increases in campaign spending in judicial contests in which nominees are chosen by primaries, with campaign expenditures skyrocketing in judicial primaries around the nation in the last decade. In its view, "there is every reason to assume the same dynamic would take hold in New York State Supreme Court races." Feerick Commission Report, *supra*, at 15-16.

The Feerick Commission also found that "the convention system has delivered geographic diversity to the Supreme Court bench, an attribute of no small moment in the state's sprawling judicial districts covering many counties." *Id.* at 15. Candidates from rural counties located in the same

judicial district as urban counties have been able to succeed under the convention system where the delegates can trade votes among multiple candidates for multiple vacancies. Simple arithmetic aggregation of primary votes would be less likely to lead to that diversity.

To be sure, conventions have drawbacks as well. By design, conventions concentrate the nominating power in fewer hands, which might present an opportunity for someone to abuse that power. Some policymakers might conclude that this possibility outweighs whatever other benefits might flow from the convention system; others might conclude that the benefits of the system outweigh the potential for abuse. There are tradeoffs involved in every system for selecting judges. Determining the appropriate balance is a matter for legitimate policy debate in the States. The Constitution, however, does not resolve this debate. It allows the States to choose delegate-based conventions in place of direct conventions, especially for judicial offices.

B. New York's Judicial Convention System Meets the Requirements of This Court's Election Jurisprudence.

1. New York neither categorically excludes candidates nor imposes arbitrary obstacles to the ballot when it holds an election.

When the nominating phase is an integral part of the selection process, this Court's precedents establish two principles. First, participants in the nomination process may not be categorically excluded based on unconstitutional criteria, such as race. For example, this Court has struck down party rules that excluded blacks from voting in the party primary. *Smith v. Allwright*, 321 U.S. 649 (1944).

Second, when an election is held, the State may not impose severe barriers to candidates' access to the ballot absent a compelling interest. For example, this Court has struck down the requirement that candidates pay an unreasonably high filing fee to be listed on a primary ballot. *Bullock v. Carter*, 405 U.S. 134, 149 (1972); *cf. Storer*, 415 U.S. at 738 (remanding for consideration of whether state law imposed "excessively burdensome requirements upon independent candidates" for access to the ballot in the general election). On the other hand, this Court has upheld a ban on write-in candidates on primary ballots. *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). Thus, not all barriers are subject to heightened scrutiny. "Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects — at least to some degree — the individual's right to vote and his right to associate with others for political ends.'" *Burdick*, 504 U.S. at 433 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). But "'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Clingman v. Beaver*, 544 U.S. at 587 (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)).

New York's election laws comport with these principles. The State does not categorically exclude anyone from participating in the nomination process based on race or other protected characteristics. And with respect to nominations for Supreme Court Justices, the only election that is held is the primary for delegates to the judicial convention. The barriers to ballot access for this primary are quite low. A candidate needs at most 500 signatures for a place on the primary ballot. *See* N.Y. Election Law § 6-136(2)(i), (3). Even when a candidate is running unopposed, voters will have an opportunity to cast write-in votes if they file a petition with 500 signatures requesting the right to do so. *See id.* § 6-164.

These requirements are considerably less onerous than other measures this Court has upheld. *See, e.g., Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (upholding a requirement that nominating petitions contain signatures from five percent of registered voters); *Burdick*, 504 U.S. at 441 (upholding a ban on write-in candidates on primary ballots).

And even if the ballot-access principles carry over to the voting at the convention itself, New York's laws easily satisfy them. There are no statutory barriers to a judicial candidate's being considered by the delegates at the convention; there is not even a written ballot. Candidates need not, for example, file petitions with the signatures of five percent of delegates before their name can be submitted to a vote of the convention. Under the statute, delegates are free to vote however they like, regardless of how the other delegates are voting. Because there are literally no barriers to ballot access at the convention, there can be no constitutional issue relating to the convention ballot.

2. The features identified as problematic by the lower courts merely distinguish conventions from primaries.

In invalidating New York's convention system, the lower courts were troubled that some candidates might not have a "realistic opportunity" to participate in the nomination process because the delegates would not give them meaningful consideration as potential nominees. Pet. App. 41, 163. But the features that make this true do not involve any constitutional defect. Rather, they are typical of delegate-based conventions. If these features render the convention system unconstitutional, then virtually any convention system that did not merely reflect popular sentiment would fail as well.

First, the courts concluded that a so-called challenger candidate — one who enjoyed support from rank-and-file party members but not the party leadership — would be unlikely to win the party's nomination. In other words, a convention may settle on a nominee who is different from the nominee that would emerge if a direct primary were held. But the whole point of conventions is to insulate (to some degree) the choice of nominee from the rank-and-file voters. If conventions were constitutionally permissible only if their outcomes mirrored those that would result from direct elections, they would serve no purpose. The Constitution does not require nominations to reflect the unmediated choice of the party membership as a whole. As this Court observed in *White*, it is "too plain for argument" that the State may require that party nominations be settled "by convention." 415 U.S. at 781. And in a convention system, the candidate needs support from the delegates, not the rank-and-file members.

Second, the lower courts were troubled that in practice, it seems that the convention delegates merely ratify choices made by the party leadership. In other words, the party leaders seem to exercise control over the delegates by enforcing party discipline. But whatever the merits of strong party discipline as a matter of policy, it is not a constitutional problem. It is unremarkable that a party — which, presumably, is composed largely of like-minded individuals who share core values — would try to proceed by consensus whenever possible. And it is legitimate for the delegates to defer to the judgment of party leaders — who, one would expect, have become leaders precisely because they understand what the rank-and-file members want.

This is not a phenomenon unique to nominating conventions. Congress, for example, routinely acts on party-line votes. Nobody suggests that citizens are deprived of their right to representation merely because their congresspersons

often follow marching orders set by the majority and minority leaders. So too with conventions. Voters who object to strong party discipline are free to vote for delegates who pledge their independence, just as voters are free to vote for congresspersons who buck the party leadership.

Third, the delegates have no constitutional obligation to give meaningful consideration to all candidates who seek their support. This Court has vigorously affirmed the special protections accorded by the First Amendment to the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences." *Jones*, 530 U.S. at 575 (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)). "The moment of choosing the party's nominee . . . is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'" *Id.* (quoting *Tashjian*, 479 U.S. at 216); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1999) (the "party, and not someone else, has the right to select [its own] standard bearer"). Just as a State cannot dictate who may sit as delegates to a party's convention, *see Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 126 (1981); *Cousins v. Wigoda* 419 U.S. 477 (1975), it cannot tell the delegates seated at the convention that they must give meaningful consideration to every qualified individual seeking to become the party's candidate.

Moreover, this Court observed in *Jones* that some political parties are "virtually inseparable from their nominees," giving as examples Theodore Roosevelt's Bull Moose Party, the La Follette Progressives of 1924, and the Henry Wallace Progressives of 1948. 530 U.S. at 575. Candidate-centered parties are antithetical to the notion that political parties must give meaningful consideration to all qualified candidates and may not simply ratify the choice of party leaders.

Finally, it is irrelevant that — as the lower courts concluded — it would be virtually impossible for a challenger candidate to run a slate of delegates pledged to him or her in every single district, with the goal of amassing enough support at the convention to force his or her nomination. Delegates — who, after all, often must choose several nominees, not just one — do not run on a platform supporting a particular judicial nominee. The judicial conventions thus are not merely an inexact proxy for direct democracy, as (for example) the Electoral College has largely become for presidential elections. *See McPherson*, 146 U.S. at 36 ("Doubtless it was supposed that the electors would exercise a reasonable independence and fair judgment in the selection of the Chief Executive, but experience soon demonstrated that . . . they were so chosen simply to register the will of the appointing power in respect of a particular candidate."). The system is not designed around the idea of pledged candidates, and nothing in the Constitution requires such a system.

3. The electoral process as a whole offers significant checks on persistent abuses of power by party leaders.

If delegates or party leaders pick nominees that rank-and-file voters do not want, those voters have several options. First, they need not vote for the nominee in the general election. Voters are free to cast their ballots for other listed candidates or for write-ins. Independent candidates need gather no more than 4,000 signatures to appear on the ballot. N.Y. Election Law § 6-142(2).

Second, if the leadership consistently thwarts the rank-and-file members' preferences, the members can select new leaders. Party leaders are chosen either directly or indirectly by the membership. *See* N.Y. Election Law § 2-106 (members of the state and county committees are elected through

primaries); *id.* § 2-112 (committe chairs and other officers are selected by the committee members); *id.* § 2-120 (other party positions are filled through primary elections). Those in positions of leadership retain their power only so long as on the whole they satisfy the rank-and-file members.

Third, disaffected voters can leave the party entirely. This option is especially viable in New York, which has five major parties, giving voters a broader choice beyond Democrats and Republicans. Even in areas of effectively single-party rule, that party is unlikely to remain dominant if it alienates a large segment of the population by nominating consistently unpopular candidates for public office.

The District Court found that these democratic checks have not prevented party leaders from promoting candidates who would not win a direct primary, blocking candidates with rank-and-file support, or making decisions based on reasons unrelated to the candidates' qualifications. But the fact that the system may not guarantee that nominees will be selected based only on their popular support or objective qualifications does not suggest a constitutional defect in the statute on its face. If the political parties are misbehaving, it is up to their members — not the courts — to discipline them.

II. In Any Event, The Lower Courts Erred In Completely Dispensing With The State's Choice Of A Convention System And Imposing A Direct Primary Instead

By enjoining judicial nominating conventions and imposing a primary system — even temporarily — the lower courts made a choice that is properly reserved to the Legislature. That choice was neither necessary nor proper. Even if this Court concludes that the challenged provisions are unconstitutional — which, for the reasons explained above, it should not — it should vacate the preliminary

injunction imposed below and remand for the courts to craft a more narrowly tailored remedy.

Federal courts must be cautious not to blur the separate duties of the judicial and legislative branches of government, particularly when fashioning a remedy to redress a constitutional flaw in a statute. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (courts must be "mindful that [their] constitutional mandate and institutional competence are limited"); *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) ("A ruling of unconstitutionality frustrates the intent of the elected representatives of the people.").

That is particularly true where the case touches on core sovereign interests, as with election matters. For example, in *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964), a three-judge panel concluded that Alabama's apportionment scheme was unconstitutional but declined either to stay an impending primary election that was subject to the scheme or to impose its own plan immediately. *Id.* Instead, the court gave the Alabama Legislature an opportunity to design a reapportionment plan that comported with the court's preliminary findings. *Id.* It was only when the Legislature failed to act that the District Court imposed its own plan. *Id.* at 586. Viewing the remedy to be "an appropriate and well-considered exercise of judicial power," this Court remarked that the District Court "correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Id.*

The manner in which state elections are held is likewise "primarily a matter for legislative consideration and determination." *Id.* Thus, where a court concludes that an election law is unconstitutional, it should give the Legislature an adequate opportunity to remedy the problem. *See Lewis v. Casey*, 518 U.S. 343, 362, 363 n.8 (1996) (finding that the injunction imposed by the District Court was "inordinately – indeed, wildly – intrusive" where court did not give the States the first opportunity to correct the errors made in the internal administration of their prisons); *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (In discharging their duty to protect constitutional rights, "courts cannot assume that state legislatures . . . are insensitive to the requirements of the Constitution."). By imposing a remedy without first giving the New York Legislature an opportunity to respond to the findings in this case, the lower courts erred.

Even if immediate relief were required, the court must "limit the solution to the problem" and "try not to nullify more of a legislature's work than is necessary." *Ayotte*, 546 U.S. at 328-29. It must restrain itself from "rewriting state law" to conform to its view of how best to comply with constitutional requirements. *Id.* at 329 (brackets omitted).

New York's Legislature has long favored the use of the representative convention system over direct primaries to nominate its Supreme Court Justices. The lower courts usurped that legislative judgment when they rejected the convention system for direct primaries because they view the latter as the better system. The scope of the remedy they imposed was anything but narrow. The courts invalidated the statutory provisions requiring judicial nominating conventions in their entirety. They did not tailor the remedy to the specific defects they found in the convention system or to enjoining particular behavior by the parties that created the constitutional problems. Instead, they decided for the

State which of many alternatives should be implemented in lieu of conventions, and imposed that remedy across the board and indefinitely.

It is no answer that New York uses direct primaries for nominating candidates for most of its other elective offices. The Court of Appeals misread New York Election Law § 6-110 when it concluded that the direct primary system is the State's "default" system for nominating candidates for public office. Pet. App. 83. Section 6-110 provides, "All other party nominations of candidates for offices to be filled at a general election, except as provided herein, shall be made at the primary election." Because it expressly excluded nominations for the office of Supreme Court Justice from primary elections, *see* N.Y. Election Law § 6-106, the Legislature rejected the idea that the default would be to hold primaries for this particular office.

Nor is it of any moment that New York uses direct primaries to nominate candidates for judicial office for courts of limited jurisdiction (where those offices are elected rather than appointed). These courts are, by definition, limited in jurisdiction geographically and by subject matter. Rank-and-file voters are more likely to know the candidates for their local courts. And, due to their limited subject matter jurisdiction, judges of these local courts are less likely to address issues of broad impact. These considerations may mitigate the concerns about fundraising and diversity that counsel in favor of using conventions to nominate Supreme Court Justices.

Selection of trial court judges remains a matter of substantial public debate in New York, as indicated by the number and variety of *amici* in this case. That debate has resulted in many studies and proposals with respect to how the State of New York should select its jurists.[7] In view of this ongoing debate, and as the political body accountable to the citizens of New York, the Legislature will continue — as it has throughout history — to consider and debate the issues raised by this case. And should this Court conclude that the current statutory framework fails to comport with the federal Constitution, the Legislature should be given the opportunity to engage in this debate and devise a workable solution to any problems the Court identifies with respect to its nominating process.

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7. *See, e.g.*, Feerick Commission Report; Judith S. Kaye, *The State of the Judiciary 2006* (Feb. 6, 2006), *available at* http://nycourts.gov/admin/stateofjudiciary/soj2006.pdf; Judicial Selection Task Force, Ass'n of the Bar of the City of N.Y., *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (Oct. 2003), *available at* http://www.abcny.org/pdf/Judicial%20selection%20task%20force.pdf.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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In The
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONERS NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT JUSTICES IN THE CITY AND STATE OF NEW YORK, HONORABLE DAVID DEMAREST, J.S.C.

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QUESTIONS PRESENTED

1. Party conventions are so deeply ingrained in this country's political history that in *American Party of Texas v. White*, 415 U.S. 767 (1974), this Court held that it is "too plain for argument" that a State may require intraparty competition to be resolved either by convention *or* primary. Did the Second Circuit err in effectively declaring delegate-based conventions unconstitutional by finding that voters and candidates have a right to associate directly?

2. What is the appropriate scope of First Amendment rights of voters and candidates within the arena of intraparty competition?

   (a) Did the Second Circuit err, as a threshold matter, in applying this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974) and related ballot access cases, which were concerned with the dangers of "freezing out" minor party and non-party candidates, to internal party contests?

   (b) If *Storer* does apply, did the Second Circuit run afoul of *Storer* in holding that voters and candidates are entitled to a "realistic opportunity to participate" in the party's nomination process as measured by whether a "challenger candidate" could compete effectively against the party-backed candidate?

3. Did the Second Circuit err in preferring the First Amendment rights of voters and candidates over those of political parties by subjecting New York's statutory scheme to strict scrutiny review rather than a balancing test that accords equal weight to the associational rights of political parties?

QUESTIONS PRESENTED – Continued

4. Did the Second Circuit err in imposing the drastic remedy of a mandatory injunction installing primaries in place of the convention system, effectuating the precise opposite of what the New York legislature intended?

PARTIES TO THE PROCEEDING

Petitioners are the New York State Board of Elections, Douglas Kellner, Neil W. Kellner, Helena Moses Donohue, Evelyn J. Aquila, the New York County Democratic Committee, the New York Republican State Committee, the Associations of New York State Supreme Court Justices in the City and State of New York, Justice David Demarest, individually, and as President of the State Association, and Andrew M. Cuomo, Attorney General of the State of New York.

Respondents are Margarita Lopez Torres, Steven Banks, C. Alfred Santillo, John J. Macron, Lili Ann Motta, John W. Carroll, Philip C. Segal, Susan Loeb, David J. Lansner, and Common Cause/NY.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES	1
STATEMENT OF THE CASE	1
I. OVERVIEW AND HISTORY OF NEW YORK'S DELEGATE-BASED JUDICIAL CONVENTION	2
A. Origins Of The Judicial Convention	2
B. The Convention Framework	4
C. The General Election	6
II. FOR TWO CENTURIES OF AMERICAN POLITICAL LIFE, CONVENTIONS HAVE SERVED THE BENEFICIAL FUNCTION OF MEDIATING THE PREFERENCES OF PARTY MEMBERS	7
III. PROCEEDINGS BELOW	12
A. The District Court's Mandatory Injunction	13
B. The Second Circuit Opinion	14
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. THE FIRST AMENDMENT DOES NOT ESTABLISH A RIGHT TO A PRIMARY AND, FOR TWO CENTURIES, CONVENTIONS HAVE BEEN RECOGNIZED AS A CONSTITUTIONALLY PERMISSIBLE METHOD OF SELECTING CANDIDATES	18

TABLE OF CONTENTS – Continued

Page

A. The Constitution's Broad Grant Of Authority To States Over Elections Permits Them To Choose A Representative Form Of Democracy And The First Amendment Must Be Viewed In Light Of The Intended Roles Of The Participants 18

B. The Second Circuit's Decision Conflicts With This Court's Precedents, Which Embrace Conventions As A Constitutional Alternative To Direct Primaries For Selecting Candidates 20

II. VOTERS AND CANDIDATES HAVE AT MOST A CONSTITUTIONAL RIGHT TO ACCESS THE STATE'S NOMINATION SYSTEM, NOT A RIGHT TO A REALISTIC CHANCE OF WINNING 23

A. In The Arena Of Intraparty Competition, Where There Is No Concern About Freezing Out Political Views, The *Storer* Line Of Ballot Access Cases Does Not Apply 25

B. To The Extent The *Storer* Test Applies To Intraparty Competition, At Most, Voters And Candidates Are Only Entitled To Access The Nominating Process The State Adopts 27

III. THE SECOND CIRCUIT ERRED IN APPLYING STRICT SCRUTINY TO NEW YORK'S STATUTORY SCHEME RATHER THAN BALANCING THE CONSTITUTIONAL INTERESTS AT STAKE 32

TABLE OF CONTENTS – Continued

Page

A. Where There Are Competing Constitutional Rights The Court Applies A Balancing Test 33

B. New York's Electoral System Directly Furthers The Constitutional Rights Of Political Parties And Their Members To Associate And Choose Candidates 37

C. There Is No Significant Burden On The First Amendment Rights Of Voters And Candidates Who Have Access To The Convention System 41

D. The Convention Furthers Other Weighty Governmental Interests And The Court Should Defer To The Considered Judgment Of New York's Legislature In Crafting It 44

IV. THE REMEDY WAS NOT NARROWLY TAILORED TO REPAIR THE PURPORTED CONSTITUTIONAL DEFECT IN LIGHT OF LEGISLATIVE INTENT 47

CONCLUSION 49

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

American Party of Texas v. White, 415 U.S. 767 (1974) ..... *passim*

Anderson v. Celebrezze, 460 U.S. 780 (1983) ... 25, 26, 33, 37

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) 17, 47, 48

Bachur v. Democratic Nat'l Party, 836 F.2d 837 (4th Cir. 1987) 22, 36, 37

Bartnicki v. Vopper, 532 U.S. 514 (2001) 34

Bullock v. Carter, 405 U.S. 134 (1972) 26, 27, 32, 37

Burdick v. Takushi, 504 U.S. 428 (1992) 43, 49

California Democratic Party v. Jones, 530 U.S. 567 (2000) 17, 34, 38, 39

Clements v. Fashing, 457 U.S. 957 (1982) 16, 32

Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) 34, 35

Cousins v. Wigoda, 419 U.S. 477 (1975) ..... *passim*

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LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir. 1998) 36

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TABLE OF AUTHORITIES – Continued

Page

Mistretta v. United States, 488 U.S. 361 (1989) 46

In re Murchison, 349 U.S. 133 (1955) 46

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TABLE OF AUTHORITIES – Continued

Page

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Williams v. Rhodes, 393 U.S. 23 (1968) 25, 31, 37

CONSTITUTIONAL PROVISIONS AND STATUTES

Ala. Code §17-13-2 ..... 11, 12

Ariz. Rev. Stat. §16-342 ..... 11, 12

Ark. Code Ann. §7-7-104 11

Code of Jud. Cond., 22 N.Y. Comp. Codes. R & Regs. §100 Q 6

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Colo. Rev. Stat. §1-4-701 11

Colo. Rev. Stat. §1-4-1304 ..... 11, 12

Conn. Gen. Stat. §9-382 ..... 11, 12

Conn. Gen. Stat. §9-451 11

Del. Code. tit. 15, §3113 11

Fla. Stat. §99.0965 ..... 11, 12

Ga. Code Ann. §21-2-180 11

Idaho Code §34-707 ..... 11, 12

10 Ill. Comp. Stat. 5/7-9 11

Ind. Code Ann. §3-8-4-2 ..... 11, 12

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TABLE OF AUTHORITIES – Continued

Page

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N.Y. Elec. L. §1-104 ..... 7, 44
N.Y. Elec. L. §6-106 ..... *passim*
N.Y. Elec. L. §6-124 ..... 5, 13, 37, 48
N.Y. Elec. L. §6-126 5
N.Y. Elec. L. §6-136 42
N.Y. Elec. L. §6-138 ..... 7, 44
N.Y. Elec. L. §6-158 13
N.Y. Elec. L. §6-158(5) 5
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N.Y. Elec. L. §7-108(8) 7, 44
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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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TABLE OF AUTHORITIES – Continued

Page

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The opinion of the United States Court of Appeals for the Second Circuit, Pet. App. 1-92, is reported at 462 F.3d 161 (2d Cir. 2006), *cert. granted*, *New York State Board of Elections v. Lopez Torres*, 127 S. Ct. 1325 (2007).[1]

The opinion of the United States District Court for the Eastern District of New York, Pet. App. 93-191, is reported at 411 F. Supp. 2d 212 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *cert. granted*, *New York State Board of Elections v. Lopez Torres*, 127 S. Ct. 1325 (2007).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 30, 2006. The petition for a writ of certiorari was filed on November 28, 2006, and was granted on February 20, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional and statutory provisions involved are annexed hereto as an appendix.

STATEMENT OF THE CASE

This case involves the constitutionality of the method of selection for all trial court judges of general jurisdiction throughout New York State. The lower courts declared unconstitutional on First Amendment grounds New York's 86-year-old statutory scheme used to nominate major party candidates, known as the judicial convention system, and mandated that this election method be replaced

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[1] "Pet. App. __" refers to the Appendix to the Petition for Certiorari; "JA __" to the Second Circuit Joint Appendix; "HE __" to Volumes 1-9 of the Second Circuit Record on Appeal; and "Tr. __" to Volume 10 of the Second Circuit Record on Appeal.

by direct primaries – the precise system which New York's legislature specifically rejected in 1921.

I. OVERVIEW AND HISTORY OF NEW YORK'S DELEGATE-BASED JUDICIAL CONVENTION

A. Origins Of The Judicial Convention

In 1846, New York amended its Constitution to provide for the popular election of judges sitting on its trial courts of general jurisdiction, known as the New York State Supreme Court. Pet. App. 9. In the absence of statutes providing otherwise, a party's judicial candidates for the State Supreme Court were chosen by the same method as other candidates for State office, which at the time, was by party convention. *Id.*

In 1911, during a nationwide wave of populism, the Legislature changed the law to provide for State Supreme Court nominations by primary election – a then relatively new mechanism for selecting candidates. Pet. App. 9. Over the next nine years, however, the reform met with widespread condemnation. Critics denounced the primary as burdensome and expensive, and warned that it facilitated the sale of judgeships to the highest bidder, thus threatening judicial independence. *Id.*

In response to these complaints, the Legislature, in 1921, restored the convention system. As representatives of the people and unpledged to any particular candidate, the locally-elected delegates would gather at party conventions for each Judicial District to nominate the party's candidate who would appear on the general election ballot in November. Pet. App. 10. In the view of the drafters of the 1921 legislation, conventions were a particularly fitting method for nominating judicial candidates because, as the Senate Report summarized, "It is inherent in the functions of the judicial office that the office should seek the man, and not the man the office." *Report of Special Comm. of Senate on Primary Law Submitted with Bill to Establish State Wide Judicial Conventions*, S. Doc. No. 34 at 3 (N.Y. 1918). Thus, after experimenting with both a

convention system and primary elections for trial judges, the New York Legislature made a deliberate and reasoned choice to employ nominating conventions instead of primaries to select candidates for the office of Justice of the Supreme Court of New York.

For the last 86 years, New York's legislature has stood by this considered choice, even as the merits of the judicial nominating convention have remained a subject of serious public debate. Pet. App. 10. Indeed, at New York's constitutional convention in 1967, a proposal to replace the judicial convention with primaries was extensively debated, but ultimately rejected. Likewise, in 1973, the Joint Legislative Commission on Court Reorganization recommended that the convention system should remain in place. *See Report of the Joint Legislative Comm. On Court Reorganization,* Legis. Doc. 24 at 12 (1973). Most recently, in February 2006, the New York State Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission") concluded, as the Legislature did in 1921, that conventions are preferable to primaries for nominating candidates for the office of Justice of the Supreme Court of New York. *See* Commission to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* at 3 (February 6, 2006) (the "Feerick Report").[2] As the Feerick Commission noted, "primaries pose a great risk of attracting substantial increases in partisan spending on New York State judicial campaigns, which, as our research clearly shows, would serve to further undermine confidence in the judiciary." *Id.* Nominating conventions, by contrast, "facilitate access to a place on the ballot for non-majority candidates . . . allow members of geographic and other minority factions to build coalitions to win a spot on the ballot[,] . . . [and] allow candidates to avoid the high cost of conducting primary campaigns in judicial districts." *Id.* at 30. Accordingly, the report concluded, "without public financing of

[2] Available at http://www.law.fordham.edu/commission/judicialelections/images/jud-finreport/pdf.

judicial elections, the judicial nominating convention system should be retained rather than replaced by primary elections." *Id.* at 11.

B. The Convention Framework

The New York Constitution divides the state into twelve Judicial Districts from which candidates for Justice of the Supreme Court of New York are nominated and elected. N.Y. Const. art. VI, §6(a), (b) Pet. App. 11, 101. Each Judicial District, in turn, includes a number of smaller Assembly Districts, the same political subdivisions from which New Yorkers elect their representatives to the State Assembly. The delegates who will later attend the Judicial District's nominating convention are elected at the Assembly District level in party primary elections held in September. Pet. App. 11, 101, 104. The number of delegates for each Assembly District is governed by each party's internal rules. The Election Law requires that the allotted number of delegates for each Assembly District be substantially proportional to the percentage of total votes cast in that Assembly District for the party's gubernatorial candidate in the last general election. Pet. App. 11-12, 104-105.

Any enrolled member of a recognized political party residing within the Judicial District may run for delegate. To get on the primary ballot, a prospective delegate need only gather 500 valid signatures from enrolled party members in the Assembly District during the petitioning period in the spring. Pet. App. 12, 108. Delegates are independent agents who are free under New York law to exercise their own discretion to vote for the candidates of their choice.[3] In practice, because delegate is a party

[3] *See* Tr. 881:6-11 (Keefe) (admitting that delegates can vote for any candidate they want). Plaintiffs' expert, Dr. Cain, also acknowledged that a "[d]elegate is free to do as he or she sees fit." Tr. 310:19 (Cain). All of the witnesses who served as delegates, including Plaintiffs' own witnesses, testified that no party leader ever instructed, much less coerced, them to vote for a particular judicial candidate and they

(Continued on following page)

position, local community-based organizations that actively participate in the party, such as political clubs or party committees, are involved in endorsing candidates for these offices and gathering petition signatures.[4] On delegate primary day in early September, registered party members in each Assembly District vote for delegates among those who have met the signature requirement to gain a place on the ballot.[5]

In late September, two or three weeks after delegates are selected, the political parties hold their judicial nominating conventions. Pet. App. 18 (citing N.Y. Elec. L. §§6-124, 6-126, 6-158(5)). At the convention, any delegate may nominate any judicial candidate, and, once this process is complete, the delegates vote for as many nominees as there are open Supreme Court seats in that Judicial District. Because delegates are generally called upon to fill multiple vacancies from an array of judicial candidates, delegates are not intended to be pledged to any particular judicial candidate. *See* Pet. App. 107.

Although the judicial nominating convention is convened just two to three weeks after delegates are selected, judicial candidates may campaign for their party's nomination for at least nine months. During the

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always could nominate the candidate of their choice. Tr. 521:3-22; 540:13-541:7 (Carroll); Tr. 235:9-14 (Berger); Tr. 1261:25-1262:6 (Schiff); Tr. 1333-11-1335:4 (Ward); Tr. 1583:10-13; 1583:18-20 (Kellner); Tr. 1986:25-1987:2; 1993:17-19 (Giske); Tr. 1947:11-20 (Levinsohn); Tr. 2035:22-2036:4, Tr. 2036:1[illegible]21 (Allen); Tr. 2088:12-22 (Connor). Indeed, a number of these witnesses, testified that they had voted against the county leader's preferred candidate. *See e.g.*, Tr. 1583:21-25 (Kellner); 1333:11-1335:4 (Ward).

[4] Tr. 1557:20-25 (Kellner); Tr. 1984:6-1985:6 (Giske); JA 346 (Levinsohn Decl. ¶ 16). But any rank-and-file party member can run for the office of delegate. Tr. 1554:3-6 (Kellner); Tr. 168:12-18 (Berger).

[5] If the number of delegate candidates is less than or equal to the number of available positions in that Assembly District, then the candidates are all deemed elected, and the Assembly District does not hold a needless election.

campaign season, many candidates appear at various events attended by rank-and-file members, party leaders and potential delegates.[6] The names of candidates running for delegate and alternate delegate are publicly available by July.[7] Thus, judicial candidates can readily contact delegates to lobby their support. Six sitting Justices testified below that through hard work and perseverance they were able to gain delegate support, win the nomination, and then win a Supreme Court seat.[8] Indeed, although she did not win her party's nomination, lead plaintiff Lopez Torres was able to garner 25 delegate votes out of 91 cast (with three abstentions), falling 21 shy of a majority. Tr. 612-15 (Lopez Torres).

Contests among judicial candidates for the nomination are often waged in the pre-convention period and generally resolved before the convention opens, much like national party conventions for presidential candidates. Tr. 1566:9-14, 1577:8-1578:7 (Kellner). As a result, the conventions themselves are typically uneventful and the minutes record the nominations as unopposed or affirmed by unanimous voice vote. JA 388 (Giske Decl. ¶ 16); Tr. 1577:18-20 (Kellner); Tr. 2092:10-2093:21 (Connor).

C. The General Election

The last step of the selection process for Supreme Court Justice is the general election in November. On

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[6] *See* Tr. 1308:22-1309:6; 1309:18-25 (Schiff); *Code of Jud. Cond.*, 22 N.Y. Comp. Codes. R & Regs. §100 Q; Tr. 1572:12-18 (Kellner); HE 6797 (Lunn Dep. Tr. 83:14-24); Tr. 1773:8-24; 1754:3-1756:9; 1760:23-1764:23 (Freedman).

[7] *See* Tr. 1785:22-1786:16 (Freedman); Tr. 1572:4-8 (Kellner); *see also* Tr. 507:15-509:16 (Carroll).

[8] *See* HE 6784-90; 6794; 6803; 6805 (Lunn Dep. Tr. 31:21-46:14; 49:22-50:14; 53:21-56:15; 72:24-73:13; 107:9-109:25; 115:14-116:11); JA 128-29 (Sise Decl. ¶ 9); Tr. 1487:3-1493:15; 1498:12-1504:21 (Sise); Tr. 1754:16-1770:12 (Freedman); Tr. 1963:22-1968:8 (Schlesinger); Tr. 1812:16-1814:17; 1814:21-1815:13; 1816:15-20; 1823:7-1824:10 (Gangel-Jacob); Tr. 1858:18-1860:1; 1866:14-1869:18; 1881:8-1885:3 (Abdus-Salaam).

election day, all registered voters in New York State have an opportunity to vote for the office of Justice of the Supreme Court of New York within their respective Judicial Districts. Voters may choose from among the nominees selected at each party's convention, as well as any other candidate who has achieved ballot position through the alternative routes to the general election ballot. Indeed, in addition to seeking the nomination of a major political party, New York's challenged statutory scheme affords any would-be judicial candidate the option of: (1) petitioning directly onto the general election ballot under N.Y. Elec. L. §6-138 by gathering 4,000 signatures (or 3,500 outside of New York City); (2) running as a minor party candidate under N.Y. Elec. L. §1-104; or (3) having a vote cast for them as a write-in candidate under N.Y. Elec. L. §§7-104(7) and 7-108(8). The Second Circuit does not deny that candidates have a "reasonable means of general election ballot access" *via* these alternative routes. Pet. App. 57.

II. FOR TWO CENTURIES OF AMERICAN POLITICAL LIFE, CONVENTIONS HAVE SERVED THE BENEFICIAL FUNCTION OF MEDIATING THE PREFERENCES OF PARTY MEMBERS

Since their inception in the early nineteenth century, conventions have served the beneficial purpose of mediating the preferences of rank-and-file party members through the informed determinations of delegates and local party leaders. Conventions were not designed to be the functional equivalent of primaries. Instead, their mediating structure makes them a better associational mechanism for parties to select nominees who represent their interests, preserving party unity and maximizing their chances in the general election.

In the first third of the nineteenth century, local party groups across the country instituted the nominating convention as "the best means of concentrating the popular will, and giving it effect." Paul David *et al.*, *The Politics*

of National Party Conventions 56 (1984). The very structure of the nominating convention, in which party members at a primary elect delegates, who then convene to select the party's candidates, was not designed to give rank-and-file party members a direct voice in nominations, or to encourage candidates to appeal directly to rank-and-file members. Howard Penniman, *Sait's American Parties and Elections* 279-81 (4th ed. 1948). Instead, nomination decisions were filtered through delegates.

Traditionally, conventions put delegates "two or even three degrees" removed from rank-and-file party members. 2 Moisei Ostrogorski, *Democracy and the Organization of Political Parties* 121 (1964). In this intricate, multi-layered system, it was impractical for candidates to canvass enough voters in every district to ensure the election of a majority of delegates committed to their nomination, nor were they expected to make the attempt. *See* Emanuel Philipp, *Political Reform in Wisconsin* 101 (1910) ("[I]t frequently occurred that candidates were nominated who had not spent one cent to advance their own interests.").

Indeed, any attempt at "'packing' . . . [delegate] primaries in the interest of certain candidates" was seen as an "evil." Frederick W. Dallinger, *Nominations for Elective Office in the United States* 125 (1897). The duty of rank-and-file members was to vote for "honest, intelligent, and public spirited delegates," not to choose on the basis of "meddling" by candidates. John Francis Reynolds, *The Demise of the American Convention System, 1880-1911* 67 (2006). Each delegate was responsible for choosing candidates for many offices. Pledged delegates were unusual, and "it was rarely clear where any prospective delegate stood with respect to candidacies or causes." Reynolds at 29; *see also* Dallinger at 127. Because delegates were not pledged to candidates, rank-and-file members could not choose candidates by voting for particular delegates – and, accordingly, the rank-and-file members generally did "not trouble themselves speculating about the nominees." Reynolds at 29.

The conventions themselves focused on creating a "slate" of nominees who would best represent the party's interest, not on advancing the ambitions of individual candidates. It was a common and encouraged practice for groups of delegates to bargain over the slate, "throwing over some of their candidates and entering into a reciprocal agreement for the rest," thus building the strongest ticket for the party. Ostrogorski at 126; *see also* Dallinger at 70. And, as at the delegate primaries, candidates were not expected to participate; they usually "did not show up" at the conventions, and their occasional presence was considered "unsettling" and "awkward." Reynolds at 69-70.

By design, party leadership heavily influenced the entire convention process. As a Senate committee on nominating conventions remarked in 1838, "it was not merely the right but the duty of office-holders to . . . influence and to direct the people in the choice of their representatives." Ostrogorski at 40. At the delegate primaries, a "slate" of delegates was generally "settled beforehand" by the party committee, the "controlling power" of each local party organization. Ostrogorski at 113-14. This "'slate' prepared by the local committee" was "apt to be successful," Dallinger at 60, and any "competitive contest for delegate seats" was seen as "detrimental to party unity," Reynolds at 28-29. Absent dissent within the party on nominations, the conventions themselves were frequently uneventful as "the proceedings are all settled beforehand." Ostrogorski at 125. Parties considered this "harmony" at conventions to be ideal. Reynolds at 46.

Delegate conventions have enjoyed a long history as the mechanism for nominating presidential candidates. In 1860, Abraham Lincoln worked to get his name on the ballot through local and statewide conventions by courting support among party leaders to secure the Republican party nomination. Doris Kearns Goodwin, *A Team of Rivals: The Political Genius of Abraham Lincoln* 224-36

(2005). In 1932, Franklin Delano Roosevelt was nominated at the Democratic National Convention by delegates, many of whom were selected by methods other than primaries. Richard Bain & Judith Parris, *Convention Decisions and Voting Records* 240 (2d ed. 1973). In 1952, the Republican party nominated Dwight Eisenhower over Senator Robert A. Taft despite Taft's having won the largest number of candidate preference primaries. David B. Truman, *Party Reform, Party Atrophy, and Constitutional Change: Some Reflections*, 99 Pol. Sci. Q. 637, 639 (1984-85). The party leaders saw Eisenhower as a far better vote getter in the general election than Taft, although the latter was "Mr. Republican." Byron E. Shafer, *Anti-Party Politics*, 63 Pub. Int. 95, 96 (Spring 1981).

As of 1952, approximately fifty-five percent of the delegates to the Democratic and Republican national conventions were chosen through party conventions and other party organization processes. Paul T. David, Ralph Goldman & Richard Bain, *The Politics of Party Conventions* 249 (1960). It was widely recognized that "in only a few states [did] the voter have a direct voice in the choice of delegates to the national convention." Hugh A. Bone, *American Politics and Party System* 309 (3d ed. 1965). Until 1972, about 60 percent of states "used some sort of open meetings other than primaries" for the purpose of picking delegates to the national convention. Robert B. Denhardt & Jay E. Hakes, *Delegate Selection in Non-Primary States*, 63 Nat'l Civic Rev. 521, 521 (1974). And through 1972, the Democratic Party had no requirements that delegates vote for a particular candidate on the first ballot. Congressional Quarterly, *National Party Conventions 1831-2000* 27 (2001).

Following the 1968 Democratic National Convention, the McGovern Commission found that thirty-two states and territories selected their delegates through a state convention. George McGovern, *Democratic National Commission on Party Structure and Delegate Selection, Mandate for Reform, reprinted in* 117 Cong. Rec. 32909, 32911 (1971). In twenty-one of these states, rank-and-file party members attended the convention and selected their

delegates; in six, party officials chose the delegates at the convention; and in five, both methods were used. In four states, the party committee selected the delegates. In four other states, party committees selected a portion of the delegation. Indeed, the entire delegations of Georgia and Louisiana were appointed by the governors of those states; in Arizona, Arkansas, Maryland and Rhode Island, as well as in Puerto Rico, all the delegates, and in Oklahoma, New York, Pennsylvania, and the State of Washington, from one-third to one-half the delegates, were named by the state party committee. Alexander M. Bickel, *Reform and Continuity: the Electoral College, the Convention, and the Party System* 40 (1971). The McGovern Commission further found that "in at least 20 states, there were no (or inadequate) rules for the selection of Convention delegates, leaving the entire process to the discretion of a handful of party leaders." McGovern at 32909. While the McGovern Commission found that there were problems with the convention system, it nevertheless determined "the National Convention was an institution well worth preserving." *Id.* at 32910.

In the twentieth century, primaries became the most popular method of nomination chosen by state legislatures. Yet conventions remain in wide use today. *See generally* Council on State Governments, *Book of States* Vol. 38 at 272-73 (2006). In at least thirty-two states, election laws currently require or allow some use of conventions.[9] Several

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[9] *See* Ala. Code §17-13-2; Ariz. Rev. Stat. §16-342; Ark. Code Ann. §7-7-104; Colo. Rev. Stat. §1-4-701, §1-4-103, §1-4-1304; Conn. Gen. Stat. §9-451, §9-382; Del. Code. tit. 15, §3113; Fla. Stat. §99.0965; Ga. Code Ann. §21-2-180; Idaho Code §34-707; 10 Ill. Comp. Stat. 5/7-9; Ind. Code Ann. §3-8-4-10, §3-8-4-2; Iowa Code §43.65, §43.78; Kan. Stat. Ann. §25-202; Ky. Rev. Stat. §118.105; Me. Rev. Stat. tit. 21-A, §321; Md. Code. Ann., Elec. §5-703.1; Mich. Comp. Laws Const. art. V, §21; Neb. Rev. Stat. §32-710, §32-616; N.H. Rev. Stat. Ann. §667:21; N.M. Stat. Ann. §1-8-2; N.Y. Elec. L. §6-106; N.D. Cent. Code §16.1-13-14; Ohio Rev. Code Ann. §3513.11; Or. Rev. Stat. §248.009; R.I. Gen. Laws §17-12-13; S.C. Code Ann. §7-11-10, §7-11-30; S.D. Codified Laws §12-5-21; Tenn. Code Ann. §2-13-203; Tex. Elec. Code §181.002, §181.003;

(Continued on following page)

states encourage further experimentation by parties by allowing them to choose their nominating mechanism.[10] Other states, to preserve party unity and prevent the splintering of support over several candidates, have hybrid systems combining elements of direct primaries and conventions. In Iowa, if no candidate receives at least 35 percent of the vote in a direct primary, then a party convention nominates the candidate for that office. Iowa Code §§43.65, 43.78. In Colorado, candidates must receive at least 30 percent of the votes at a convention to be placed on the primary ballot. Colo. Rev. Stat. §1-4-103. In Connecticut, conventions choose candidates who then run in direct primaries as party-endorsed. Conn. Gen. Stat. §9-382.

To cut down on the burdens to the state and candidates, and to maintain party unity, several states require or allow minor parties to nominate by convention. *See e.g.*, Colo. Rev. Stat. §1-4-1304; Fla. Stat. §99.0965; Tex. Elec. Code §§181.002, 181.003. Other states, to encourage more diverse and better-qualified candidates, use conventions to nominate for certain offices. *See e.g.*, Ind. Code Ann. §3-8-4-2; Mich. Comp. Laws Const. art. V, §21; S.D. Codified Laws §12-5-21. New York is among these, using conventions to nominate judges. N.Y. Elec. L. §6-106. Finally, many states use conventions to fill vacancies in nominations or to write party platforms and select party officers. *See e.g.*, Ariz. Rev. Stat. §16-342; Idaho Code §34-707.

III. PROCEEDINGS BELOW

Plaintiffs, individual voters and would-be Supreme Court candidates, brought this action on March 14, 2004, against the New York State Board of Elections (the "Board of Elections") for declaratory and injunctive relief challenging the constitutionality of New York's judicial convention system and seeking permanent injunctive relief

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Utah Code Ann. §29A-9-404; Va. Code Ann. §24.2-509; Wash. Rev. Code §29A.20.121.

[10] *See e.g.*, Ala. Code §17-13-2.

installing a primary system in its place. Pet. App. 30-31. On June 9, 2004, Plaintiffs filed a motion for a preliminary injunction seeking to enjoin the Board of Elections' enforcement of the three New York State Election Law statutes codifying the convention system, N.Y. Elec. L. §§6-106, 6-124 and 6-158, on grounds that they deny citizens and candidates equal protection under the law, and violate the First and Fourteenth Amendments. *See* Pet. App. 31.

The Attorney General of the State of New York appeared as statutory intervenor in defense of the challenged statutory provisions. As parties directly affected by the action, the following intervened as Defendants: the New York County Democratic Committee, the New York Republican State Committee, the Association of Supreme Court Justices of the State of New York, the Association of Supreme Court Justices of the City of New York, and Justice David Demarest, individually, and as President of the State Association. Pet. App. 31.

A. The District Court's Mandatory Injunction

On January 26, 2006, the United States District Court for the Eastern District of New York issued its decision declaring the convention system unconstitutional and issuing a mandatory injunction barring enforcement of N.Y. Elec. L. §6-106 and use of the procedures set forth in N.Y. Elec. L. §6-124 and directing that primary elections be held for major party candidates until the Legislature adopts a new statutory scheme. Pet. App. 31, 95-96, 183-184.

The district court held that New York State's convention system violates the First Amendment, concluding that major party leaders, not delegates or voters, control who becomes a New York Supreme Court Justice. Pet. App. 95.

Defendants filed a notice of appeal on February 7, 2006, and in light of, among other things, the immediate impact that the district court's decision would have on incumbents running for re-election in November 2006, moved the district court for a stay pending appeal. On

March 3, 2006, the district stayed its decision pending appeal. Pet. App. 33. On March 14, 2006, the United States Court of Appeal entered an order expediting the appeal. Pet. App. 33. On March 1, 2007, the district court extended the stay in light of the Court's grant of certiorari.

B. The Second Circuit Opinion

On August 30, 2006, the Second Circuit affirmed, holding that the district court (1) properly concluded that Plaintiffs demonstrated a clear likelihood of success on the merits of their First Amendment claim; (2) properly enjoined the judicial nominating convention; and (3) appropriately required that party nominations proceed *via* direct primary election until the Legislature enacts a new nominating mechanism.

The Court of Appeals first determined that the First Amendment applies to the nominating phase (an issue never in dispute) and concluded that New York must afford "voters and candidates the right to associate through and in the judicial nominating process." Pet. App. 41. In expounding on the scope of this purported right, the Court of Appeals held that candidates and voters alike must have "a *realistic opportunity* to participate in the nominating process." Pet. App. 41, 44 (emphasis added).

In measuring whether the convention system satisfies that standard, the Second Circuit followed the district court in viewing the nominating process through the lens of a "challenger candidate," defined as "a reasonably diligent candidate who, although possessing public support, lacks the resources provided by a supportive political party and has no other means of overcoming the burdens that the system imposes." Pet. App. 60. The Second Circuit claimed to find support for the "challenger candidate" paradigm in this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), where the relevant inquiry was whether "a reasonably diligent *independent* candidate [can] be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot." Pet. App. 60.

In applying the *Storer* test to the context of intraparty competition, the Court of Appeals determined that the burdens imposed by the convention system were severe. The court supported this conclusion based on the district court's finding that, under New York's delegate-based convention system, the possibility of successfully lobbying party-backed delegates is "non-existent" and "challenger candidates" can never satisfy the signature requirements for running their own pledged delegates in each Assembly District. Pet. App. 45.

SUMMARY OF ARGUMENT

1. The Constitution grants states broad authority to structure elections in the manner of their choosing. For two centuries and continuing today, states have used that authority to enact laws directing or permitting political parties to select their candidates for office through delegate-based conventions. Conventions have such a well-established place in American politics that in *American Party of Texas v. White*, 415 U.S. 767, 781 (1974), the Court held that it was "too plain for argument" that states may require that intraparty competition be resolved by convention or primary. When the Court examined the process of conducting national political conventions in *Cousins v. Wigoda*, 419 U.S. 477 (1975) and *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), it upheld the rights of parties to establish their own rules for delegate selection and voting, which rules did not give rank-and-file members the right to vote for candidates directly. Thus, contrary to the Second Circuit's view, the First Amendment does not require state legislatures that make the policy choice to prefer delegate-based conventions over primaries to make such conventions the functional equivalent of primaries. In light of the intended roles of the participants in this process, in which rank-and-file members vote for delegates and locally elected delegates choose candidates, New York's statutory scheme imposes minimal, if any, burdens on the right to vote.

2. A central flaw in the Court of Appeals' analysis is its misguided attempt to fit the square peg of a convention into the round hole of ballot access cases involving primaries and general elections. The principal cases upon which it relies, such as *Storer v. Brown*, 415 U.S. 724 (1974), involved the efforts of independent candidates or minor parties to qualify for ballot position, a context where the concern is to safeguard against "freezing out" alternate viewpoints. No such concern exists in intraparty struggles. Even if the Court were to draw an analogy to these cases, the equivalent of ballot access is merely convention access, which all candidates (including the lead plaintiff here) clearly have. But the Court of Appeals required far more, holding that so-called "challenger candidates," defined loosely as those lacking party leader support, must have a "realistic opportunity to participate." Pet. App. 44-45. The Court has never recognized a challenger candidate paradigm; to the contrary, in *Clements v. Fashing*, 457 U.S. 957, 963 (1982), the Court held that there is no constitutional right to run for office in the first place. Nor has the Court ever held that candidates are entitled to a realistic opportunity to participate, which is a judicially unmanageable standard that could only be measured by election outcomes. In the Second Circuit's mistaken view, the standard it crafted could only be met if challenger candidates could *succeed* in either convincing delegates to nominate them in lieu of the party leadership's choice, which is tantamount to winning the nomination, or in running their own pledged delegates, which completely subverts the design of a delegate-based convention by turning it into the functional equivalent of a primary. Given that there is no right to win a party nomination and no right to a primary, the Second Circuit's conclusion is plain error.

3. Where a law implicates competing constitutional rights, the Court balances the interests at stake, eschewing the application of strict scrutiny. The Second Circuit committed fundamental error by applying strict scrutiny to New York's judicial convention system in a one-sided fashion that favored challenger candidates and their

supporters in derogation of the constitutionally protected associational rights of political parties. The associational freedoms of parties are at their zenith when it comes to the selection of candidates. As the Court observed in *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1980)), "our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" Conventions provide parties an inimitable opportunity to assemble and pursue their collective interests by developing balanced tickets of candidates who will represent their diverse constituencies and best advance party goals in the general election. Measured against the weighty party associational rights which would suffer greatly if the Second Circuit's decision abolishing New York's convention system were upheld, the burdens on voters and candidates of preserving the system are slight. Rank-and-file members are free to vote for delegates of their choice, there are no significant barriers to running for delegate, delegates are free to vote as they wish and candidates can solicit the support of delegates. In balancing the relative burdens, the Court should give considerable deference to New York's legislature, which specifically adopted the convention system after an unsatisfactory experience with primaries.

4. In affirming a sweeping injunction which dismantled New York's convention system in its entirety and installed a primary system in its place, the Second Circuit disregarded this Court's directive in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 383, 397 (2006), that courts tailor the remedy to the perceived constitutional infirmity. Here, where New York's legislature made a deliberate choice to institute judicial conventions in place of primaries, the lower courts erred by imposing a drastic remedy that was directly counter to the legislature's intent.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT ESTABLISH A RIGHT TO A PRIMARY AND, FOR TWO CENTURIES, CONVENTIONS HAVE BEEN RECOGNIZED AS A CONSTITUTIONALLY PERMISSIBLE METHOD OF SELECTING CANDIDATES

A. The Constitution's Broad Grant Of Authority To States Over Elections Permits Them To Choose A Representative Form Of Democracy And The First Amendment Must Be Viewed In Light Of The Intended Roles Of The Participants

The Constitution grants states plenary authority over the "Times, Places and Manner of holding Elections." U.S. Const. art. I, §4, cl. 1; *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). There is no requirement that states employ any particular method to choose their judges or that they be elected at all. Rather, the Constitution deliberately leaves to the states, as "laboratories" of democracy, the right to provide for the selection of judges in the manner of their choosing. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Thus, states have adopted a wide array of different judicial selection systems across the country, including pure appointments, partisan elections, non-partisan elections and hybrid systems, none of which are unconstitutional *per se*.[11] New York's judicial convention system rests comfortably within this broad spectrum, relying on basic principles of representative democracy.

Such representative or delegated forms of democracy are deeply embedded in the text of the Constitution itself. For example, prior to the adoption of the Seventeenth

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[11] Tr. 742:12-744:25; JA 275-76 (Schotland Decl. ¶¶ 10-14).

Amendment in 1913, Article I Section III provided that state legislatures, not voters, select each state's Senators. Likewise, Article II, Section I provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . " who choose the President and Vice President of the United States. *See generally* Stephen Breyer, *Active Liberty* 22-26 (2005). It defies imagination that the Framers, having inscribed delegate-based selection systems into the original text of the Constitution in two critical places, would have intended the First Amendment to preclude states from adopting them.

It is certainly true that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles," *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). But nothing in the United States Constitution requires that once a state decides to make an office elective, the electoral system must ratify the direct and unmediated preferences of a plurality of voters. Rather, the critical threshold question becomes what are the roles that have been granted by the states? Here, New York's legislature only gave voters the limited role of voting for delegates and gave delegates the role of choosing candidates. Voters have an unfettered right to vote for the delegates of their choice. Delegate candidates have an unburdened path to seek that position and, once elected, delegates are free to vote their consciences. Finally, judicial candidates are not excluded from the process but are free to vie for the nomination by seeking delegate support. Viewed from the proper perspective of each participant's intended role in the process, New York's judicial nominating convention imposes only a negligible, if any, burden on First Amendment rights.

B. The Second Circuit's Decision Conflicts With This Court's Precedents, Which Embrace Conventions As A Constitutional Alternative To Direct Primaries For Selecting Candidates

In *American Party of Texas v. White*, 415 U.S. 767, 781 (1974), the Court held that it is "too plain for argument" that the state may require intraparty competition to be resolved either by convention *or* primary. The Second Circuit's decision, which mandates a primary in lieu of party convention for the nomination of judicial candidates, conflicts with *White* and other rulings of this Court, and calls into question this historically rich and enduring political process.

The Second Circuit's overly expansive view of the First Amendment as affording "voters and candidates the right to associate through and in the judicial nominating process," Pet. App. 41, effectively requires that rank-and-file voters have a direct vote in the selection of a party's nominee. This erroneous view dictates the equally erroneous result that forms of representative democracy, like the delegate-based convention at issue here, cannot pass constitutional muster because they do not involve direct appeal to voters. If permitted to stand, the Second Circuit's ruling would eviscerate this Court's holding in *White* by requiring as a practical matter that all nominations proceed by primary. In doing so, conventions for state, local and national office would be placed in jeopardy.

In *White*, the Supreme Court rejected a challenge to a Texas ballot qualification sy[illegible]n under which the major political parties were requir[illegible] nominate candidates by primary elections, smaller p[illegible]s could use either primaries or nominating conventions, and new and even smaller parties had to use precinct nominating conventions. 415 U.S. 767. Justice White, writing for seven other Justices, stated: "[i]t is too plain for argument . . . that the State may [properly] limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by

primary election or by party convention." *Id.* at 781 (citing *Storer v. Brown*, 415 U.S. 724, 733-36 (1974)); *see also Trinsey v. Commonwealth of Pa.*, 941 F.2d 224, 234 (3d Cir. 1991) (upholding use of party convention in lieu of primary to nominate Senate candidate for vacancy election).

This Court has recognized that it is an appropriate and beneficial function of a convention within a party structure to mediate the direct preferences of its rank-and-file members through delegates. In fact, in *Cousins v. Wigoda*, 419 U.S. 477, 480 (1975), this Court upheld the seating of a slate of delegates chosen at a private caucus over one popularly elected through a primary. In *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), this Court upheld the right of delegates to exercise independence and to not vote in accordance with primary results when doing so violated party rules. Similarly, lower courts have followed these precepts, recognizing that a party can choose to adopt a closed, delegate-based convention system, in which voters have "no direct voice" and their preference may only be "partially translated into the actual nomination" as "popular" support may not be "wholly determinative of the outcome":

> standing between the individual voter and the eventual nomination of a candidate may be numerous party rules and procedures so that the will of the majority of the electorate expressing a . . . preference[,] and the selection of delegates[,] may be only partially translated into the actual nomination. A finding that . . . a right to participate in a popular primary election does not foreclose party limits on the effective weight of [that] participation, or mandate that the popular ballot is to be wholly determinative of the outcome of the nomination process. Indeed in many states, delegates to the national convention are selected by means other than a primary election, so that many . . . [voters] have no direct voice in the selection of delegates.

Bachur v. Democratic Nat'l Party, 836 F.2d 837, 842 (4th Cir. 1987).

White's holding that a convention is a constitutional alternative to a primary, and *Cousins'* and *La Follette's* vindication of delegate rules that markedly depart from popular preference, would be rendered meaningless if, as the Second Circuit required, a convention must be the functional equivalent of a direct primary. No true convention system could be constitutional under that extreme view of the First Amendment for the very reason that it places delegates between voters and candidates. The Second Circuit's theory is that New York "must afford voters and candidates the right to associate through and in the judicial nominating process" and that "the First Amendment prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." Pet. App. 41, 44.[12] This theory, however, is built upon the flawed premise that the delegate-selection stage is intended to give rank-and-file voters a direct say in who the nominees of their party will be. It is not. Rather, New York's legislature made the deliberate policy choice to give delegates, not voters, the responsibility for selecting party nominees. *See Cousins*, 419 U.S. at 489 ("Delegates perform a task of supreme importance . . . [t]he vital business of the Convention is the nomination of the Party's candidates."). The only direct say voters have in this process is in the selection of the delegates who serve as voters' party representatives in the judicial nominating process. The First Amendment rights of individual voters are thus fully secured when they are given the opportunity to vote for delegates of their choice. *See id.* ("respondents overlook the significant fact that the *suffrage was exercised at the*

[12] *See also* Pet. App. 166 (as the district court, put it "more open and effective participation by voters must be allowed at the nomination stage, and candidates must be permitted an effective means of appealing to the voters when it counts.").

primary election to elect delegates to a National Party Convention") (emphasis added).

The Legislature could have chosen to give voters such a direct role. Or it could have chosen by statute to provide for selection of judicial nominees by appointment by party leaders without any role for delegates. It chose instead an intermediate route of establishing a judicial convention with features of a primary and a convention, and it was entitled to make that choice. Thus, at its core, the practices which the circuit court held to be a severe burden on voters' rights to vote and associate were simply the "network of facially innocent provisions," Pet. App. 44, which comprise a *convention system* where delegates elected to serve as party representatives, not rank-and-file party members, choose candidates.

II. VOTERS AND CANDIDATES HAVE AT MOST A CONSTITUTIONAL RIGHT TO ACCESS THE STATE'S NOMINATION SYSTEM, NOT A RIGHT TO A REALISTIC CHANCE OF WINNING

In determining the scope of First Amendment rights at the nomination phase, the Second Circuit declared that judicial candidates and voters must have a "realistic opportunity to participate" in New York's judicial nominating system. Pet. App. 41-44. Applying this amorphous standard, the Court of Appeals viewed the system through the distorted lens of a so-called challenger candidate, defined as "a reasonably diligent candidate who, although possessing public support, lacks the resources provided by a supportive political party and has no other means of overcoming the burdens the system imposes." Pet. App. 60. Under this framework, the Second Circuit upheld the district court's conclusion that the system unduly burdens First Amendment rights because, in practice, challenger candidates never succeed in running their own pledged delegates or lobbying party-affiliated delegates. Pet. App. 45.

But there is no support for a "meaningful participation" standard in this Court's long line of ballot access cases. Such a standard potentially invites federal courts to plumb the waters of electoral politics to assess whether disfavored candidates have a chance to win under any election scheme – a hazardous exercise with no clear guidance. And the Second Circuit's decision wrongly injects a standard – the *Storer* test – designed to measure ballot access for minor and independent party candidates at the general election into the arena of intraparty competition. The *Storer* strand of ballot access cases is concerned with laws that "freeze out" minor parties and independent candidates from gaining access to the general election ballot, granting the two major parties an effective monopoly on political participation. The Second Circuit's ruling rests on the assumption that *Storer's* "reasonably diligent independent candidate" standard applies to an internal conflict within a *party* – an entirely different context where there is no concern that different political viewpoints will be silenced. *See* Pet. App. 41-44.

Storer's test for ensuring minor party and independent candidate access to the general election ballot does not apply to intraparty nomination contests, where parties select their candidates for the general election. But even if *Storer* could be applied in the intraparty context, a sensible extension of *Storer* might establish the right of candidates to access the nominating system – it would (and should) do nothing to improve a candidate's long odds of winning against more established candidates within the party. That is simply a reality of elective politics and federal courts should be loath to wade into that "political thicket." *Vieth v. Jubelirer*, 541 U.S. 267, 319 (2004). Yet, going well beyond *Storer*, the Second Circuit's decision effectively requires candidates to have either direct, unmediated access to rank-and-file party members or a reasonable chance of convincing elected delegates to award them the nomination, *i.e.*, a reasonable chance to win. But this Court has never found either such right to exist.

Instead, the equivalent of ballot access in this case is convention access, *i.e.*, the right to have a candidate's name put up for consideration by the delegates.

A. In The Arena Of Intraparty Competition, Where There Is No Concern About Freezing Out Political Views, The *Storer* Line Of Ballot Access Cases Does Not Apply

The Court's line of ballot access cases that includes *Williams v. Rhodes*, 393 U.S. 23 (1968), *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *Jenness v. Fortson*, 403 U.S. 431 (1971), and *Storer*, does not confer upon insurgent party candidates a right to a "realistic opportunity to participate." Pet. App. 41-44. First, *Williams*, *Anderson* and *Jenness* all involved *interparty* competition and addressed the issue of whether the election schemes at issue were designed to "*freeze out*" minor party candidates and non-party, independent candidates from the political process by effectively denying them general election ballot access. Those cases concerned the silencing of political views by excluding political parties or independent candidates, and thus have no application to the present controversy, which concerns the scope of the rights of a candidate or voter *within a party*. *See Williams*, 393 U.S. at 31 ("[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot"); *Anderson*, 460 U.S. at 787 ("[a] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment," *id.* at 793; *Jenness*, 403 U.S. at 439 (distinguishing *Williams*, in part, because challenged statute "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life").

Second, far from articulating a different standard, *Storer* is just another variation of a *Williams* "freeze out"

case. In *Storer*, the Supreme Court was asked to determine the constitutionality of, among other statutes, a provision that required independent candidates to collect signatures from five percent of the total votes cast in California at the last general election (approximately 325,000 signatures) within a 24-day period. 415 U.S. at 738-40. In that context, the Court posed this question: "could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.* at 742. Specifically, the Court emphasized that "to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. No discernible state interest justified the burdensome and complicated regulations that in effect made impractical any alternative to the major parties." *Id.* at 746.

Thus, this Court's "freeze out" decisions, and in particular, the standard set forth in *Storer*, were not intended to apply to election systems governing party nominations, as intraparty competition does not implicate the danger of "confer[ring] an effective political monopoly on the two major parties." *Storer*, 415 U.S. at 729; *see also Anderson*, 460 U.S. at 794 ("[i]n short, the primary values protected by the First Amendment . . . are served when election campaigns are not monopolized by the existing political parties"). Arguably, the most that can be said about the *Storer* line of cases is that a party or candidate running as an independent has a right to access the general election ballot, not that any particular candidate within a party has such a right.

Nor does *Bullock v. Carter,* 405 U.S. 134 (1972) support a standard based on "meaningful participation." Pet. App. 163. In *Bullock*, the Court struck down under the Fourteenth Amendment a statute in Texas which required prospective candidates to pay an exorbitant filing fee to participate in primary elections. *Bullock*, like *U.S. v. Classic*, 313 U.S. 299 (1941), where Commissioners of Elections for Louisiana were indicted for willfully altering and falsely counting and certifying the ballots of voters in

the primary election for a congressional candidate, merely establishes a proposition that is not in dispute here: the state action requirement for triggering constitutional protection against invidious discrimination is satisfied at the nominating phase.[13] Unlike *Bullock*, which involved exclusionary filing fees, or *Classic*, which involved ballot tampering, or even *Terry v. Adams*, 345 U.S. 461 (1953), which involved racial discrimination – all of which were decided on Fourteenth Amendment or even Fifteenth Amendment grounds – this case involves none of these invidious practices and raises only voting and associational rights under the First Amendment. Of course, if the challenged provisions were discriminatory, such as in the notorious "white primary" cases (*e.g.*, *Terry*) or the exclusionary filing fees struck down in *Bullock* and in *Lubin v. Panish*, 415 U.S. 709 (1974), they would be unconstitutional under the equal protection clause. But quite to the contrary, the evidence below showed that the convention system effectively advances the important state interest of diversity. *See infra* 40, 46.

B. To The Extent The *Storer* Test Applies To Intraparty Competition, At Most, Voters And Candidates Are Only Entitled To Access The Nominating Process The State Adopts

To the extent the *Storer* test does apply to the nomination phase, the test at most would grant a reasonably diligent candidate the opportunity to access the nominating convention, *i.e.*, having a chance to put his or her name up for consideration by the delegates. But it is clear from the Second Circuit's distorted application of the *Storer* test that it measured the scope of the First Amendment right due to so-called "challenger" candidates and voters from the constitutionally impermissible standpoint of: (1) a

[13] While the state action requirement is undoubtedly triggered at the nominating phase of New York judicial election system, not all activity associated with the nominating phase necessarily constitutes state action, as discussed *infra* at 40.

candidate's likelihood of success in obtaining a party nomination; and (2) whether a candidate has direct, unmediated access to voters. The Second Circuit erroneously equated the right to *access* the general election ballot in *Storer* with either the right to *win* a party nomination outright or the right to have direct access to voters. But this Court has never found either such right to exist.

As a threshold matter, the Second Circuit conducted its constitutional analysis from the inherently-flawed perspective of the so-called "challenger candidate" – a paradigm never recognized by this Court. The Court of Appeals defined a "challenger candidate" as a reasonably diligent candidate who lacks the support of the political party leadership. But this definition is circular: no "challenger candidate" could ever capture the party nomination because upon attaining party support, the candidate would lose his or her "challenger" status. At the outset, *all* candidates start out on the same square and inevitably some candidates win party support, while others do not. The Court of Appeals failed to recognize that by the end of the nomination process, party leaders almost always rally behind the likely winners.[14] In any event, the fact that elected party leaders help to shape the party's support of particular candidates is not a description of a constitutional problem, but merely of their function as party leaders.

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[14] *See* Tr. 1580:20-1581:1, 1581:19-21, 1663:15-22 (Kellner); Tr. 1292:10-21 (Schiff); Tr. 1768:4-14 (Freedman). As one party leader described it over a decade ago, "[i]t's almost like picking a winner of a horse race after the race." Tr. 1663:15-22 (Kellner); *see also* Tr. 1286:20-1287:11, 1292:22-1293:7 (Schiff). Plaintiffs' own witness, John Carroll, testified that several insurgent candidates have been nominated. *See* Tr. 488:6-489:12 (Carroll). Petitioners also presented the testimony of six sitting Justices who were able to win delegate support and win the nomination, including in instances where they initially faced the opposition of party leaders. Tr. 1807:3-12, 1814:21-1815:13, 1816:13-1817:19 (Gangel-Jacob); Tr. 1963:22-1968:8, 1967:17-1968:5, 1980:10-15 (Schlesinger); Tr. 1763:18-1770:12 (Freedman); 1863:25-1864:7, 1881:25-1885:3, 1897:23-1898:2 (Abdus-Salaam); HE 7488-89, 1493:6-12, 1504:1-4 (Sise); HE 6782, 6784-90, 6794-98 (Lunn Dep.).

Nevertheless, going well beyond *Storer*, the Second Circuit affirmed the district court's conclusion that the burdens imposed by the convention were severe at each of the two stages of the convention process – the delegate selection stage and the convention stage. At the delegate selection stage, the court determined that the "challenger candidates" can "never" satisfy the signature requirements for running their own pledged delegates. At the convention stage, the court determined that the possibility of lobbying party-backed delegates is "non-existent." *See* Pet. App. 45. But the equivalent of ballot position cannot be (1) satisfying the signature requirements for running one's own slate of pledged delegates throughout the district or (2) successfully lobbying the chosen delegates.

The first option the Second Circuit identified – running pledged delegates – is deeply problematic because it insists upon the functional equivalent of unmediated access between voters and candidates. The Second Circuit found a severe burden on associational rights at the delegate-selection stage by focusing on how difficult it purportedly would be for a judicial candidate to recruit a full slate of delegate candidates across numerous assembly districts, publicize to all voters those delegate candidates' affiliation, and obtain all the required signatures in every district to get every delegate candidate on the ballot. But, from a constitutional perspective, finding that candidates must have a right to run pledged delegates amounts to a judicial declaration that the only nomination method that satisfies the First Amendment is a primary or its functional equivalent – a result antithetical to *White*, *Cousins*, *La Follette* and this nation's rich history of political conventions. Moreover, the Second Circuit's conclusion that judicial candidates are burdened at the delegate selection stage by the difficulty of assembling a slate of delegates stems from a mistaken understanding of fact: New York's judicial nominating system was never designed to permit judicial candidates to campaign directly to primary voters. As was made clear by Commissioner Douglas Kellner, "the idea that an individual [judicial] candidate would go out and recruit delegate candidates and run delegates pledged

to that candidate in the primary is not the system and it twists the design of the system on its head." Pet. App. 168-69 (citing, Tr. 1567 (Kellner)). Indeed, such a requirement would defeat the intention of New York's legislature, which crafted a system where party representatives are delegated the authority to vote for *multiple* judicial candidates, not conscripted to vote for just one, and judicial candidates are supposed to address their campaigning to unaffiliated delegates at the convention.

The second option – *successful* lobbying of delegates at the convention stage – amounts to winning the nomination, not merely competing for it. Even the Second Circuit implicitly acknowledges that a right to win standard would be constitutionally erroneous. *See* Pet. App. 45. Yet, the Second Circuit rests its decision on the district court's determination that it is practically impossible for disfavored candidates to lobby delegates because of the influence of party leaders. *See* Pet. App. 45-46. While Petitioners dispute that premise, even assuming its validity, the fact that the Second Circuit relied upon convention outcomes in rendering its decision demonstrates just how far the lower court departed from established First Amendment law. Would the outcome have been different if party leaders were less influential or if delegates had maverick tendencies? Faithfully applying the same analytical approach to primaries could lead to a finding of unconstitutionality where as a practical matter party leader support frequently dictates the outcome. *See* Pet. App. 192-94 (concluding primaries for civil court are an illusion of democracy). At bottom, the Court of Appeal's fundamental objection is that state party leaders recommend preferred candidates to the convention delegates and the delegates often accept these recommendations. But this objection cannot possibly mean that New York's election law is unconstitutional. It is an unalterable political reality in all systems that party leaders can and should have enormous influence over the selection of candidates.

In bending the *Storer* test to fit the unintended context of intraparty competition, the Second Circuit

would change the meaning of *Storer* entirely. At most, *Storer* stands for the proposition that reasonably diligent candidates should be given an opportunity to enter the race, not that the rules should be adjusted to improve their odds of winning. To the extent this Court's ballot access decisions offer any insight into the constitutionality of the inner-workings of intraparty competition, the principle that they espouse is merely the right to access the electoral system instituted by the state. Here, where there is no candidate ballot at the nominating stage precisely because there is a convention system in lieu of a primary, the proper equivalent to ballot access is *convention access*, *i.e.*, having a chance to put one's name up for consideration at the convention.

In *Jenness*, where the issue involved a Georgia election law that required independent and minor-party candidates to file nomination petitions signed by at least five percent of registered voters in the previous election to be listed on the general election ballot, 403 U.S. at 440, the Court's analysis focused on whether a candidate could "[get] his name printed on the ballot." In *Lubin*, 415 U.S. at 718, the Court merely established an indigent candidate's right to ballot access in the face of a mandatory filing fee statute which "operate[d] to exclude some potentially serious candidate from the [primary] ballot." In *Storer*, the Court found that the availability of a write-in alternative for independent and minor party candidates did not make it "virtually impossible" for new candidates and parties to achieve ballot access. 415 U.S. at 728 (quoting, *Williams*, 393 U.S. at 25). And in *Munro v. Socialist Workers Party*, 479 U.S. 189, 197 (1986), while the challenged provision made it more difficult for the Socialist Workers Party to access the ballot, the Court held that the state "was not required to afford . . . *automatic access* and would have been entitled to insist on a more substantial showing of voter support" before a candidate's name appeared on the ballot. (Emphasis added).

In every one of those cases, the minor party or independent candidates were clamoring for access to the general election ballot even though they had no realistic

chance of winning the election. By denying those candidates the opportunity to place their names on the general election ballot, they were "excluded" from even being *considered* for election to office. These cases do not remotely support the notion that "disfavored major-party candidates," Pet. App. 60, have a constitutional right to appeal the determination of party representatives by going directly to rank-and-file members. Indeed, as this Court has recognized in *Clements v. Fashing*, 457 U.S. 957 (1982), there is no fundamental right to be a candidate in the first place. 457 U.S. at 963 ("Far from recognizing candidacy as a 'fundamental right,' we have held that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny' ") (quoting *Bullock*, 405 U.S. at 143).

III. THE SECOND CIRCUIT ERRED IN APPLYING STRICT SCRUTINY TO NEW YORK'S STATUTORY SCHEME RATHER THAN BALANCING THE CONSTITUTIONAL INTERESTS AT STAKE

Even if New York's judicial convention, by filtering rank-and-file preferences through elected delegates, were considered to impose a significant burden on First Amendment rights (which it does not), it was still basic error for the Second Circuit to apply "strict scrutiny." Under that exacting standard, the starting – and effectively ending – point of the analysis was the purported burdens imposed on the First Amendment rights of challenger candidates and their supporters.

But the applicable constitutional test requires a balancing of the competing First Amendment rights at stake, not the application of strict scrutiny. Giving equal consideration to both sides of the constitutional equation, New York's system readily passes muster. The judicial convention advances the important First Amendment right of the party and its members to associate with candidates who, the party has determined, reflect the party's ideals. While the Second Circuit claimed to have considered the First Amendment rights of political parties,

and balanced those rights directly against the rights of voters and candidates, it is clear that the Court of Appeals applied *Anderson's* strict scrutiny test in a one-sided fashion and, by doing so, improperly subordinated the First Amendment rights of political parties to those of voters and candidates. Thus, the Second Circuit demanded that New York's statutory scheme be narrowly tailored to serve a compelling interest. In its analysis, the Second Circuit "decline[d] to recognize" what it characterized as "a compelling state interest in allowing political parties to exclude their own members from the nominating component of the state-run elective process at issue here." Pet. App. 71. Not only did the Second Circuit apply the wrong test, but it significantly overstated the extent to which the New York system impinges upon the constitutional rights of both candidates (who have no right to run for office and in any event are not prohibited from doing so under New York law) and voters (who have no right to vote for particular candidates and can freely participate in both the delegate primary and the candidate general election). The Second Circuit also failed to give appropriate deference to the judgment of New York's legislature which has long recognized the substantial state interests the convention system serves.

A. Where There Are Competing Constitutional Rights The Court Applies A Balancing Test

These circumstances – in which a law implicates constitutional interests on both sides of the equation, neither dramatically out of proportion to the other – do not call for the mechanical application of "strict scrutiny" where one set of rights is arbitrarily elevated over all others. Rather, this Court's precedents direct the Court to assess and balance all of the interests at stake, giving substantial deference to the legislature's own considered determination of that question. The core holding of the Court of Appeals to the contrary is erroneous.

Where competing First Amendment or other constitutional rights are implicated, the Court has eschewed any

presumption of unconstitutionality in favor of a balancing test. *See Frisby v. Schultz,* 487 U.S. 474, 485-88 (1988) (balancing rights of privacy and expression); *Rowan v. U.S. Post Office Dept.,* 397 U.S. 728, 736 (1970) (same); *Turner Broad. Sys., Inc. v. F.C.C.,* 520 U.S. 180, 192-94 (1997) (recognizing the speech interests of both viewers and cable operators); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 102 (1973) ("Balancing the various First Amendment interests involved in the broadcast media . . . is a task of a great delicacy and difficulty"); *Red Lion Broad. Co. v. F.C.C.,* 395 U.S. 367, 389-90 (1969) (holding that First Amendment permits the FCC to restrict the speech of some to enable the speech of others); *accord Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring) ("What this Court has called 'strict scrutiny' – with its strong presumption against constitutionality – is normally out of place where, as here, important competing constitutional interests are implicated"); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (explaining that when a law significantly implicates *competing* constitutionally protected interests, this Court has "scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests.").

This Court has also recognized the need to balance competing interests surrounding elections. For example, this Court found in both *California Democratic Party v. Jones* and *Tashjian* that the injury to the associational rights of parties can far exceed the need to protect the right to vote. *See Jones*, 530 U.S. at 573 n. 5 (determining that the injury to party associational rights greatly outweighed an ostensible "'fundamental right' of citizens 'to cast a meaningful vote for the candidate of their choice.'") (internal citation omitted); *Tashjian*, 479 U.S. at 221-22) (holding that "[t]he State's legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions in no respect make it necessary to burden the Party's rights.") (internal quotation and citation omitted).

The Fourth and D.C. Circuits have recognized the need to balance the competing rights of political parties and rank-and-file voters in the specific context of delegate-based conventions. In *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*), registered Republicans in numerous states challenged the constitutionality of the delegate allocation formula adopted by the National Republican party for its 1976 convention as violating the principle of "one-man, one-vote." *Id.* Although the court upheld the constitutionality of the formula primarily on equal protection grounds, the court also found that "[t]o the extent that voting rights are involved, warranting close judicial scrutiny, these rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did." *Id.* at 588. While the *Ripon* court acknowledged that the right to vote is implicated in the nomination process, it held the "view that, as between that right and the right of free political association, the latter is more in need of protection in this case . . . the right to organize a party in the way that will make it the most effective political organization seems clearly at stake here." *Id.* at 586. Ultimately, the court applied what was effectively a rational basis balancing test, as it concluded that there was no equal protection problem because "the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *Id.* at 586-87.

Relying on this Court's *Columbia Broadcasting* decision, the D.C. Circuit determined that the rights of voters must not come at "the price of interference" with the rights of political parties. *Id.* at 586 n. 61. The court explained that where the "two conflicting constitutional rights" of voters and political parties are at stake, voting rights are not entitled to heightened protection by the state or government as they might otherwise be in the absence of the countervailing rights of political parties. *Id.* (citations omitted). Balancing the party's First Amendment rights against the voters' rights, the circuit court

upheld the constitutionality of the party's rule governing delegate selection as related to a rational purpose.

More recently, in *LaRouche v. Fowler*, 152 F.3d 974, 994-95 (D.C. Cir. 1998), the D.C. Circuit held that strict scrutiny does not apply when a putative candidate's or voter's First Amendment rights are pitted against a political party's First Amendment rights. When asserted First Amendment interests conflict, applying rational basis review rather than strict scrutiny "best effectuates the Supreme Court's direction to approach judicial intervention in this area 'with great caution and restraint,' and to recognize 'the large public interest in allowing the political processes to function free from judicial supervision.'" *Id.* at 995 (quoting *O'Brien v. Brown*, 409 U.S. 1, 4-5 (1972)). Indeed, in *LaRouche* the D.C. Circuit rejected a challenger candidate's First Amendment challenge even though the party completely excluded delegates supporting the candidate from the nominating convention. 152 F.3d at 995-96.

In *Bachur*, the Fourth Circuit also employed a balancing test in upholding a party rule that required delegate votes to be allocated evenly based on gender. In finding no First Amendment violation, the Fourth Circuit began its analysis with the rights of political parties, noting that it had been settled by the Supreme Court in *Cousins*, 419 U.S. at 487, that "a political party has a right of political association protected by the First and Fourteenth Amendments, and that right of association carries with it a right to determine the party's own criteria for selection of delegates to the national convention." *Bachur*, 836 F.2d at 841. Indeed, the court even recognized that a party could choose to adopt a closed, delegate-based convention system, as has New York's legislature, in which voters have "no direct voice" and "popular" preference may only be "partially translated into the actual nomination" rather than "wholly determinative of the outcome." *Id.* at 842. Ultimately, the court concluded that "the limited restriction [placed] on Bachur's right to vote for delegates" did not unconstitutionally infringe upon his right to vote when "balanced" against the "broad, encompassing" First

Amendment rights of parties. *Id.* The Fourth Circuit upheld the constitutionality of the representational scheme because it "rationally advance[d] some legitimate interest of the party" in promoting female participation in party affairs. *Id.* (quoting *Ripon*, 525 F.2d at 586-87).

Here, even the Second Circuit recognized that none of the precedents it cited in support of its application of strict scrutiny involved "a scheme *identical* to New York's unique judicial selection process." Pet. App. 42 (emphasis added). Indeed, this case is different from those not merely in degree, but in kind. Those precedents each involved schemes that limited voters' access to the electoral process *without* furthering any substantial countervailing interest, such as the associational rights of political parties. *See id.* 42-45 (citing *Williams* (Ohio law effectively limited presidential ballot to major party candidates); *Bullock* (Texas law effectively limited nomination to wealthy candidates); and *Anderson* (Ohio law imposing exceptionally early filing deadline limited late-entering candidates)). When, as here, the challenged statute furthers important constitutional rights, the interests on both sides of the equation must be assessed and balanced. As we now show, the New York system directly furthers the constitutional rights of political parties and their members, and does not do so out of proportion to the burden on insurgent candidates and voters. The statute accordingly passes constitutional muster.

B. New York's Electoral System Directly Furthers The Constitutional Rights Of Political Parties And Their Members To Associate And Choose Candidates

As is true of nearly all electoral systems, New York's statutory scheme for electing judges contemplates that political parties will exercise substantial control over the candidate selection process. Facially, the party's rules determine the number of delegates and alternates it may elect in each assembly district. N.Y. Elec. L. §6-124. In practice, the party's leadership exerts substantial influence over the process in many ways including by fielding

delegates and log-rolling or coalition-building to develop a slate of candidates that will best advance the party's interests. Thus, a party exercises its constitutionally protected right of association through both the structure and conduct of the delegate primary and the nominating conventions

The New York statutes directly implicate the well-established principle that a "[p]arty's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Tashjian* 479 U.S. at 224; *see also La Follette*, 450 U.S. at 107. Indeed, "[i]n *no area* is the political association's right to exclude *more important* than in the process of selecting its nominee." *California Democratic Party*, 530 U.S. at 575 (emphases added).

This Court has repeatedly vindicated the right of parties to define the scope of their membership, and to determine and even to designate who within the party should be entrusted to select the parties' nominee. In *California Democratic Party*, the Supreme Court upheld a party's right to define the contours of its association by excluding non-members from its primary. In *Cousins*, the Court held that the right of association carries with it the right to determine the party's own criteria for selection and eligibility of delegates to its national convention, and that the state law governing the qualifications of convention delegates could not prevail over a national party's conflicting rules. Thus, the Court upheld the party's delegate slate, which was chosen in a private caucus, while disqualifying the competing slate which was popularly elected through a statewide primary. And again, in *La Follette*, the Court stressed that the party had a First Amendment right to determine the makeup of a state's delegation to the national convention. 450 U.S. at 124 ("a political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution") (citing *Ripon*, 525 F.2d at 585). Simply put, there is no constitutional right of "qualified party members" to participate in candidate selection. Pet. App. 54. Rather,

the Court has expressed a consistent preference for safeguarding the party's right to organize itself as it sees fit and to select the best candidate, including the right to insist on only having locally elected party representatives (*i.e.*, delegates) choose their nominees to the exclusion of all rank-and-file members.

The Court of Appeals decision cannot be reconciled with the long history of party control over candidate nominations. The party is entitled to enhance its chances of winning elections by picking candidates who can become "ambassador[s] to the general electorate in winning it over to the party's views." *California Democratic Party*, 530 U.S. at 575; *see also La Follette*, 450 U.S. 107); *Cousins*, 419 U.S. 477 (1975). In addition, the party has the associational right to select a candidate "who best represents the party's ideologies and [political] preferences." *California Democratic Party*, 530 U.S. at 575 (citing *Eu*, 489 U.S. at 224). The Second Circuit's contrary decision raises the real prospect of "sadd[ling a party] with an unwanted, and possibly antithetical, nominee." *California Democratic Party*, 530 U.S. at 579.

In contrast to the convention's reliance on the informed judgment of delegates guided by party leaders to select candidates, competitive primaries tend to place "a premium . . . not on building coalitions but on mobilizing factions." Truman at 646. The inevitable and undesirable result is "splintered parties and unrestrained factionalism." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 368 (1997) (citing Federalist No. 10 (Madison), quoting *Storer*, 415 U.S. at 736). Historically, primaries have increased strife within parties, "a form of independence which probably profits the public very little." Ralph Boots, *The Trend of the Direct Primary*, 16 Am. Pol. Sci. Rev. 424, 427 (1922). Unlike conventions, primaries have not fostered local party leadership and cohesion, "pushing toward the disintegration of the party." Reynolds at 7; *see also* Truman at 650. Instead of encouraging the development of a strong party network, primaries promoted the creation of "personal political machines" devoted to particular candidates. Philipp at 89; *see also* Shafer at 99.

Unlike primaries, New York's system also furthers the associational rights of political parties by allowing them to balance slates of candidates along geographic, racial, ethnic, and gender lines. Such balance is "in the party's 'interest'" because it permits the party to satisfy and represent diverse constituencies. Tr. 2121:9-14 (Connor). For instance, a judicial candidate from Staten Island would have difficulty winning a primary election in the Second Judicial District because the voters are clustered in Brooklyn. Tr. 2124:4-22 (Connor). However, failure to have a candidate from Staten Island on the ticket would hurt the party in that borough in the general election. Tr. 2103:2-17 (Connor). This problem is averted through the balanced ticket assembled at the convention. Likewise, the convention system helps parties win elections by allowing them to offer racially and ethnically balanced groups of candidates. Tr. 2103:25-2104:24 (Connor).[15]

Ultimately, the lower courts' objection is that party leaders recommend preferred candidates to the convention delegates and delegates often accept these recommendations. But this is as it should be. Indeed, it is fundamental to party politics that, in governing itself, party leaders organize the rank-and-file, set goals, and endorse candidates who they feel best advance the goals of the party. These activities cannot render an otherwise valid electoral statute unconstitutional. Indeed, while the Second Circuit blithely sweeps basic party activities into the ambit of state action, it is far from clear that the conduct of individual party leaders constitutes state action subject to constitutional scrutiny.

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[15] In 2001, 19.2 percent of Supreme Court Justices across the state were racial or ethnic minorities, even though the pool of persons eligible to be candidates (attorneys in practice for ten years) was only 8.2 percent minority. HE 7667-70 (Ex. NNN); HE 7646-49 (Ex. LLL). Notably, in the First Judicial District, where only 6.81 percent of the eligible pool consisted of minority attorneys, 44.7 percent of Supreme Court Justices were minorities. HE 7667-70 (Ex. NNN).

Even assuming it is state action, a constitutional claim that party leaders have "too much" influence over the party's nomination process presents the same kind of intractable difficulties found in political gerrymandering claims that have lead several members of this Court to conclude that such claims are nonjusticiable, and prevented the remaining members from agreeing on a manageable standard for deciding them. *See e.g.*, *Vieth*, 541 U.S. at 277-305. If some exercise of party leadership in the nomination process is permissible – even constitutionally protected – then should courts decide how much is too much? Being drawn into this political thicket without the possibility of devising manageable decisional standards would only lead to the federal judiciary imposing its unconstrained policy choices on political parties, to the grave detriment of both the political process and the judiciary's reputation and independence.

Though the Second Circuit in this case discounted the parties' interests, it ultimately was willing to acknowledge that "parties do retain the right to select a preferred candidate and advocate on her behalf," and "agree[d] that protecting those rights is a compelling state interest." Pet. App. 71. But it concluded that New York's system "is not narrowly tailored to achieve that end" in light of supposedly "less onerous means" to accomplish that goal. *Id.* Had the Court of Appeals applied the appropriate balancing test, rather than strict scrutiny, its begrudging recognition that the statute furthered a compelling state interest would have been determinative. It should be in this Court.

C. There Is No Significant Burden On The First Amendment Rights Of Voters And Candidates Who Have Access To The Convention System

There are no significant barriers under New York's electoral scheme for either voters or candidates, at either the delegate selection stage or the subsequent convention stage. With respect to candidates, at the delegate selection stage the only candidates are the delegate candidates.

Judicial candidates have no role at this stage. Anyone who wants to do so can run for delegate in the delegate primary. Delegate candidates may enter to run in the delegate primary simply by collecting 500 signatures from registered party voters. This modest signature requirement poses no significant burden and has repeatedly been upheld. *See e.g.*, *Prestia v. O'Connor*, 178 F.3d 86 (2d Cir. 1999) (upholding the constitutionality of N.Y. Elec. L. §6-136). As discussed above, the courts below overlooked this fact, instead creating an unintended role for judicial candidates by seizing on the idea that judicial candidates should be able to assemble and run their own delegate slates.

As for voters at the delegate selection stage, they have the unfettered right to vote for any would-be delegates who fulfill the modest signature requirement. Thus, voters may elect delegates of their choosing who share their interests and values, and will advance them in the convention process. An individual voter's opportunity to cast a ballot for his preferred delegate fully vindicates that voter's First Amendment rights irrespective of whether there is any realistic chance that the delegate himself will be elected, let alone have his preferred judicial candidate nominated at the convention. *See Cousins*, 419 U.S. at 489.

At and leading up to the convention stage, judicial candidates can lobby delegates for support. Delegates, in turn, may support, and propose for nomination, any candidate he or she likes.[16] The nominating convention affords voters no direct role in the selection of the party's nominee at the convention stage, whose interests are represented by the delegates the voters elected at the delegate selection stage. Voters, of course, ultimately have

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[16] Tr. 235:3-14 (Berger); Tr. 521:3-22, 540:13-541:7 (Carroll); Tr. 1261:25-1262:6 (Schiff); Tr. 1325:24-1326:2 (Ward); Tr. 1583:10-13, 1583:18-20 (Kellner); Tr. 1986:25-1987:2, 1993:17-19 (Giske); Tr. 1947:11-21 (Allen); Tr. 2088:12-22 (Connor).

an opportunity to cast their ballots for judicial candidates at the general election.

Thus, if this Court accepts the inherent design of a true delegate-based convention system as being consistent with the Constitution, in light of the intended roles of voters, delegates and judicial candidates, respectively, it is clear that New York's statutory scheme for electing Justices of the State Supreme Court does not impose severe burdens on the right to vote. Indeed, none of the structural barriers for voters and candidates that have led this Court to strike down state ballot access laws is present here.

Moreover, while the issue here concerns access to the nominating phase, this Court has repeatedly instructed that the alleged burdens imposed by state election statutes must be viewed in the totality of the state's electoral scheme. In this respect, the Court has repeatedly looked to whether challenged electoral schemes provide alternative means for accessing the ballot.[17] Here, New York's electoral scheme provides reasonable alternative means of access to the general election ballot. Far from being irrelevant, the general election is the only stage in this electoral process where voters are given a direct opportunity to express their preferences for particular candidates. To the extent particular candidates have any intended right to appeal

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[17] *See e.g., Jenness*, 403 U.S. at 440 (determining that Georgia's election laws served to ensure reasonably open access to the ballot because "alternative routes are available to getting his name printed on the ballot," including entering a party primary or circulating nominating petitions as an independent candidate); *Storer*, 415 U.S. at 737 n. 7 (sustaining party-disaffiliation requirement, as independent candidates who failed to qualify for the ballot could "nevertheless resort to the write-in alternative provided by California law"); *Lubin*, 415 U.S. at 718 (candidates excluded by filing fee lacked alternative means of coming before the voters); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (holding that Hawaii's ban on write-in voting imposed only a "limited burden" on voters because adequate alternative ballot access existed); *Munro*, 479 U.S. at 199 ("[i]t can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election").

directly to voters, that right arises only at the general election stage and is fully provided by ready access of individual candidates to alternative paths to the general election ballot. *See* N.Y. Elec. L. §6-138 (petitioning directly onto the general election ballot by gathering 4,000 signatures (or 3,500 outside of New York City)); N.Y. Elec. L. §§1-104 and 6-106 (running as a minor party candidate, as lead plaintiff Lopez Torres did on the Working Families Party's ticket); N.Y. Elec. L. §§7-104(7) and 7-108(8) (having a vote cast as a write-in candidate).

D. The Convention Furthers Other Weighty Governmental Interests And The Court Should Defer To The Considered Judgment Of New York's Legislature In Crafting It

In applying the constitutional balancing test, the Court should give due deference to the careful policy choice of New York's legislature in adopting it. "Where a legislature has significantly greater institutional expertise as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." *Nixon*, 528 U.S. at 399 (Breyer, J., concurring).

After a failed nine-year experiment with direct primaries in the early twentieth century, New York restored the judicial nominating convention as a means of securing judicial impartiality and public confidence in the judiciary. *See* Pet. App. 9. A well-recognized criticism of competitive primaries is that they "involve[d] heavy expenses both to the public and to the candidates," Penniman at 387, greatly disadvantaging candidates who were not either wealthy or supported by interest groups. Philipp at 90. After carefully considering alternate arrangements on several occasions,[18] the New York legislature has concluded

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[18] *See Report of the Joint Legislative Comm. on Court Reorganization*, Legis. Doc. 24 at 12 (N.Y. 1973) (finding it "undesirable" to change the method of electing Supreme Court judges); Tr. 344:1-12 (Regan) (describing the state's 1967 consideration and rejection of changes to judicial nominating conventions); The Feerick Report at 30.

that judicial nominating conventions are the best mechanism to prevent undignified and expensive judicial campaigns, thereby improving the impartiality of and public confidence in the judiciary. The Feerick Report at 30; Judith S. Kaye, Chief Judge of the State of New York, *The State of the Judiciary* 6 (2006) ("[n]othing is more destructive of public confidence in the impartiality of judges than the need to raise large amounts of money.").[19]

The Second Circuit simply fails to take into account in its decision that the statute at issue in this case governs the nomination of *judges*. As "big money" campaigns for positions on state judiciaries "rapidly spread[ ]," judicial

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[19] *See also The State Convention,* New York Times, May 1, 1917 (editorial urging restoration of judicial nominating conventions); *Miller Declares Primary a Fraud,* New York Times, Oct. 23, 1920 (candidate for governor calls for restoration of nominating conventions for State judges, arguing that primaries lead to the pervasive influence of money and provide a forum for "demagogue[s]"); Tr. 1541:24-1542:20 (Kellner); JA 365 (Kellner Decl. ¶ 18); 24 ABCNY Reports No. 228 at 7-8 (advocating a return to the convention system "thus obviating the undignified methods by which such candidates [were] constrained to seek nomination to election.").

Like New York, many states have balanced the interest in holding judges electorally accountable with the interest in protecting the impartiality and reputation of the judiciary, and decided to restrict popular control over the nomination and election of judges. *See* American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (2004). Sixteen states have adopted some version of the Missouri Plan. *Id.*; Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 724 (1995). Under this plan, judges are initially appointed. Croley at 724; American Judicature Society. Subsequently, the judges stand for unopposed retention elections; voters can choose to recall the judge, but cannot choose a replacement. *See Republican Party of Minn.*, 536 U.S. at 791 (O'Connor, J., concurring). In two other states, Illinois and Pennsylvania, candidates for judicial positions initially compete in partisan elections, but stand for retention elections for subsequent terms. *See* American Judicature Society. Still other states have nonpartisan judicial elections, or do not allow for popular election of judges at all. *Id.*

candidates in states with direct primaries and popular elections are forced into fund-raising races. Brennan Center for Justice, *The New Politics of Judicial Elections 2004* 13. The average cost of a successful campaign for a state supreme court position increased 45 percent, to over $650,000, from 2002 to 2004 alone. *Id.* This rise in the cost of campaigns makes judicial candidates ever more dependent on donors, and can "leave judges feeling indebted to certain parties or interest groups." *Republican Party of Minn.*, 536 U.S. at 790 (O'Connor, J., concurring). Because the judiciary's legitimacy "ultimately depends on its reputation for impartiality," *Mistretta v. United States*, 488 U.S. 361, 407 (1989), due process disallows even the appearance of bias: "to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (internal citation omitted). By eliminating costly and unseemly primary campaigns, New York's convention system advances its significant interest in ensuring impartiality and "properly protect[ing] the judicial process from being misjudged in the minds of the public," *Cox v. Louisiana*, 379 U.S. 559, 565 (1965).

In addition to enhancing judicial independence and confidence in the judiciary, the convention system promotes the State's interest in enhancing racial, ethnic and gender diversity on the bench and ensuring broad geographic representation.[20] In this regard, the trial record was replete with both statistical and anecdotal evidence demonstrating the diversity of New York's trial court bench under the convention system.[21] Likewise, the

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[20] *See* Feerick Report at 30 ("In contrast to primaries, which are able to grant victory only to majority vote getters, conventions allow member of geographic and other minority factions to build coalitions to win a spot on the ballot."); HE 4917-4980 at 4934-35, 4953-56, 4964-65 (Expert Report of Prof. Michael Hechter).

[21] HE 7667-70 (diversity chart comparing number of justice to lawyers admitted at least 10 years); Tr. 1343:23-1344:1, 1345:24-1346:2 (Ward); 2031:10-15 (Allen); Tr. 1889:4-1890:4 (Abdus-Salaam). *See also amicus curiae* brief supporting certiorari by the Mid-Manhattan Branch

(Continued on following page)

evidence showed that the convention system allowed smaller counties ranging from Hamilton County to Richmond County to gain significant representation on the bench whereas in primaries they would be dominated by the largest counties in each judicial district.[22]

IV. THE REMEDY WAS NOT NARROWLY TAILORED TO REPAIR THE PURPORTED CONSTITUTIONAL DEFECT IN LIGHT OF LEGISLATIVE INTENT

If some form of a true delegate convention must be constitutionally permissible, as *White* requires, then the lower courts should not have completely dismantled New York's chosen election method and replaced it with a primary as an "interim" remedy. Instead, consistent with this Court's directive in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the remedy should have been narrowly tailored to fit the purported constitutional defect in light of legislative intent.

The Court has cautioned that in remedying a constitutional flaw in a statute, courts should avoid "'rewrit[ing] state law to conform it to constitutional requirements.'" *Ayotte*, 546 U.S. at 329 (quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). "[T]he touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Ayotte*, 546 U.S. at 330 (citation omitted). Yet, that is precisely what the lower courts here did.

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of the NAACP and the Metropolitan Black Bar Association; *amicus curiae* brief supporting certiorari by the Asian American Bar Association of New York; Second Circuit *amicus curiae* brief by the Women's Bar Association of the State of New York.

[22] HE 4942, 4953-56, 4964-65, 4980 (Hechter Report); Tr. 1224:1-7 (Hechter); JA 126-27, 129-30 (Sise Decl.); Tr. 1495:25-1498:3, 1514:14-1515:4 (Sise). *See also* Second Circuit *amicus curiae* brief by the Richmond County Bar Association.

While the Second Circuit was not explicit about whether it purported to set aside New York's system for electing Supreme Court Justices on a facial or as-applied basis, the injunction it upheld barred the Defendants from enforcing New York Election Law §6-106 and from using the procedures set forth in §6-124 and ordered that "the nomination of Supreme Court Justices shall be by primary election until the legislature of the State of New York enacts a new statutory scheme." Pet. App. 185. It thus effectively invalidated the statutes entirely, restrained the State from sanctioning any form of judicial nominating convention for the office of Supreme Court Justice, and rewrote State law to impose a primary.

This injunction eviscerates, not just circumvents, the Legislature's intent in choosing a convention process for selecting party candidates. In upholding this remedy, the Second Circuit made plain that it would consider nothing short of the installation of a direct primary to be constitutional, in direct conflict with this Court's decision in *White*. Thus, the Second Circuit chose to thwart the Legislature's choice.

Rather than disregard the Legislature's express intent to *avoid* primaries, the lower courts should have tailored the remedy to address the conventions' purportedly offending features, while still preserving the convention system itself. Courts should seek "not to nullify more of a legislature's work than is necessary." *Ayotte*, 546 U.S. at 329. "[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Id.* (internal citation omitted). Several remedial options exist that would have done far less violence to the Legislature's choice than the mandatory injunction entered by the district court. Among other things, the Second Circuit could have considered: (1) reducing the number of petition signatures required; (2) decreasing the number of delegates; (3) extending the time period before the convention to give more time for candidates to lobby and delegates to deliberate; and (4) ordering the political parties to allow candidates to address the

convention. *See* Feerick Report at 30-36. Instead of demolishing an entire electoral system, the Second Circuit should have simply set aside any provisions of the statutory scheme that it found problematic and allowed the Legislature to remedy those particular aspects of the statutes.

This error is all the more egregious given the strong interests that states, as sovereigns, have in crafting their own election procedures. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992). At bottom, the judgment about the best way to nominate judicial candidates is a choice best made by a legislature answerable to the electorate, rather than a federal court. *See id.*

CONCLUSION

For the foregoing reasons, this Court should reverse the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the Constitution of the United States:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

New York Election Law

§ 6-106: Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

§ 6-124: A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been

elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified list and if an equal number of votes were cast for two or more such alternates, the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate; substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

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No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, et al.,
Petitioners,

v.

MARGARITA LÓPEZ TORRES, et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS KELLNER, NEIL W. KELLEHER, HELENA MOSES DONOHUE AND EVELYN J. AQUILA

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QUESTIONS PRESENTED

1. Whether "insurgent candidates" (Br. in Opp. 1; Pet. App. 64)—i.e., candidates not favored by their party's leadership—have a First Amendment right to a "realistic opportunity to participate" in the candidate-selection process of the party of their choice.

2. Whether Sections 6-106 and 6-124 of the New York Election Law, which establish the basic framework of New York's 85-year-old system of using party conventions to nominate candidates for the position of New York Supreme Court Justice, are facially invalid because they impose severe burdens on insurgent candidates' opportunities to participate in the candidate-selection process of the party of their choice.

3. Whether the Second Circuit erred when, after invalidating New York's 85-year-old party convention system, it imposed in its place virtually the same system of party primaries that the New York Legislature rejected when it created the convention system in 1921.

PARTIES TO THE PROCEEDING

Petitioners are the New York State Board of Elections, Douglas Kellner, Neil W. Kelleher, Helena Moses Donohue, Evelyn J. Aquila, the New York County Democratic Committee, the New York Republican State Committee, the Associations of New York State Supreme Court Justices in the City and State of New York, Justice David Demarest, individually and as President of the State Association, and Andrew Cuomo, Attorney General of the State of New York.

Respondents are Margarita López Torres, Steven Banks, C. Alfred Santillo, John J. Macron, Lili Ann Motta, John W. Carroll, Philip C. Segal, Susan Loeb, David J. Lansner, and Common Cause/NY.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. THE FIRST AMENDMENT DOES NOT COMPEL A STATE TO GRANT "INSURGENT CANDIDATES" ACCESS TO THE NOMINATION PROCESSES OF THE POLITICAL PARTY OF THEIR CHOICE 14

A. Respondents' First Amendment Rights Are Satisfied By Reasonable Access To The General Election Ballot 15

B. Respondents' Supposed Right Of State-Enforced Access To Political Parties' Candidate-Nomination Processes Trenches Upon The Parties' Associational Rights To Determine Their Standard-Bearers 26

II. THE NEW YORK STATUTES ARE NOT FACIALLY INVALID 30

A. The New York Statutes Impose No Significant Burden On Respondents' Associational Interests 30

B. Respondents Have Failed To Proffer A Sufficient Basis For Facial Invalidation Of The New York Statutes 33

III. THE COURTS BELOW LACKED AUTHORITY TO MANDATE THE HOLDING OF PRIMARY ELECTIONS 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Party of Tex. v. White,
415 U.S. 767 (1974) 15, 26, 27, 28

Anderson v. Celebrezze, 460 U.S. 780 (1983) ..... *passim*

Ayotte v. Planned Parenthood of N. New Eng.,
546 U.S. 320 (2006) 36

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) 15

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 33, 34

Bullock v. Carter, 405 U.S. 134 (1972) ..... *passim*

Burdick v. Takushi, 504 U.S. 428 (1992) 25, 27

Cal. Democratic Party v. Jones,
530 U.S. 567 (2000) ..... *passim*

Capitol Square Review & Advisory Bd. v.
Pinette, 515 U.S. 753 (1995) 20

Clingman v. Beaver, 544 U.S. 581 (2005) 24, 25, 29, 30

Democratic Party v. Wisconsin ex rel. La
Follette, 450 U.S. 107 (1981) 26, 29

Eu v. S.F. County Democratic Cent. Comm.,
489 U.S. 214 (1989) 12, 27, 29

Fortson v. Morris, 385 U.S. 231 (1966) 15

Greater New Orleans Broadcasting Ass'n v.
United States, 527 U.S. 173 (1999) 28

Hudgens v. NLRB, 424 U.S. 507 (1976) 30

Jenness v. Fortson, 403 U.S. 431 (1971) 23

Johnson v. California, 543 U.S. 499 (2005) 21

Jones v. N.C. Prisoners' Union,
433 U.S. 119 (1977) 20

Kusper v. Pontikes, 414 U.S. 51 (1973) 21, 27

Lerman v. Bd. of Elections,
232 F.3d 135 (2d Cir. 2000) 10

Lewis v. Casey, 518 U.S. 343 (1996) 13, 35

Lubin v. Panish, 415 U.S. 709 (1974) 21

Missouri v. Jenkins, 515 U.S. 70 (1995) 35

Mistretta v. United States, 488 U.S. 361 (1989) 24

Moore v. Ogilvie, 394 U.S. 814 (1969) 21

Munro v. Socialist Workers Party,
479 U.S. 189 (1986) 11, 12, 23

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 16

New York v. Ferber, 458 U.S. 747 (1982) 34

Reno v. ACLU, 521 U.S. 844 (1997) 35

Republican Party v. White, 536 U.S. 765 (2002) 15

Republican Party of Minn. v. White,
416 F.3d 738 (8th Cir. 2005), *cert. denied*,
126 S. Ct. 1165 (2006) 24, 26

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 16

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. (2000) 35

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) 28

Storer v. Brown, 415 U.S. 724 (1974) ..... *passim*

Tashjian v. Republican Party,
479 U.S. 208 (1986) 16, 26, 27, 29

Terry v. Adams, 345 U.S. 461 (1953) 19, 21

United States v. Classic, 313 U.S. 299 (1941) 8, 19, 20

Virginia v. Hicks, 539 U.S. 113 (2003) 13, 33, 34

Williams v. Rhodes, 393 U.S. 23 (1968) ..... *passim*

Statutes

N.Y. Election Law § 1-104 ..... 4, 5

N.Y. Election Law § 3-102 ..... 3, 36

N.Y. Election Law § 3-104 ..... 3, 36

N.Y. Election Law § 6-106 31

N.Y. Election Law § 6-110 36

N.Y. Election Law § 6-124 ..... 5, 32

N.Y. Election Law § 6-126 6

N.Y. Election Law § 6-134 5

N.Y. Election Law § 6-136 5

N.Y. Election Law § 6-138 ..... 6, 22

N.Y. Election Law § 6-142 5

N.Y. Election Law § 6-158 6

Other Authorities

New York State Board of Elections, 2006 Elections Results for Representative in Congress 25

BRIEF FOR PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS KELLNER, NEIL W. KELLEHER, HELENA MOSES DONOHUE AND EVELYN J. AQUILA

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-92) is reported at 462 F.3d 161. The opinion of the district court (Pet. App. 93-191) is reported at 411 F. Supp. 2d 212.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2006. The petition for a writ of certiorari was filed on November 28, 2006, and was granted on February 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 1 to the Constitution of the United States provides:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Section 6-106 of the New York Election Law provides:

Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

Section 6-124 of the New York Election Law provides:

A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from

the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified list and if an equal number of votes were cast for two or more such alternates, the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate; substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

STATEMENT

This case concerns respondents' facial challenge to the State of New York's 85-year-old system of requiring political parties to use conventions attended by delegates to select their nominees for the office of New York Supreme Court Justice. The basic framework of that system is established by Sections 6-106 and 6-124 of the New York Election Law. Respondents include disappointed "insurgent candidates"

who failed to obtain the nomination of their respective parties, several voters who claim to have supported their candidacies, and the New York branch of Common Cause. They contend—and the courts below held—that both provisions of New York law are unconstitutional on their face because they violate the associational rights of "insurgent candidates" and the voters who support them.

Petitioners New York State Board of Elections and its commissioners (collectively, the "Board") were the defendants named in respondents' complaint. The Board is responsible for the administration and enforcement of the New York Election Law. N.Y. Election Law §§ 3-102, 3-104. The terms of the district court's injunction prohibit the Board "from enforcing New York Election Law § 6-106, and from using the procedures set forth in § 6-124," and require the Board to establish and administer a system of "primary election[s] until the legislature of the State of New York enacts a new statutory scheme." Pet. App. 185.

1. In 1846, New York amended its state constitution to require the popular election of Justices of the New York Supreme Court, the State's trial court of general jurisdiction. *See* Pet. App. 9. Lacking specific statutory guidance, political parties selected their candidates for Supreme Court Justice by the same method employed to nominate candidates for other state offices at the time: party convention. *See id.*

Reflecting a rise in progressive political sentiment, in 1911 the New York State Legislature changed the law to provide for Supreme Court nominations through direct primary elections. Pet. App. 9. But the subsequent decade proved that "bare-knuckled primary elections" are a poor means of selecting qualified individuals for the bench, as the political contests dissuaded qualified jurists from seeking election. *See id.* Moreover, the primary system required candidates for Supreme Court Justice to raise large sums of money, creating at least the appearance of partiality toward their donors. *See id.*

Responding to these concerns, by 1921 the New York State Legislature had implemented a new convention-based system that eliminated direct primaries but, through a system of representative democracy, still provided the parties' rank-and-file members with a say in the selection of their parties' nominees. Pet. App. 10. Under this system, each September, the parties hold so-called "delegate primaries" in each of New York's 12 judicial districts. Each judicial district is divided into geographical sub-units called assembly districts, and in the delegate primaries, the party members of each assembly district elect uncommitted delegates to represent the assembly district at the party's judicial district convention. It is the delegates to the judicial district convention who nominate the party's candidates for the position of Supreme Court Justice for the judicial district. The contest among the nominees of the various parties is then ultimately settled at the November general election. *See id.* This system is codified, in part, in the two New York statutory provisions here at issue: Sections 6-106 and 6-124 of the New York Election Law.

New York Election Law § 6-106 simply reads: "Party nominations for the office of justice of the supreme court shall be made by the judicial district convention." A separate provision of the New York Election Law defines a "party" as any political organization whose candidate for governor of New York received 50,000 or more votes in the most recent gubernatorial election. N.Y. Election Law § 1-104(3). In 2006 and 2002, five political parties qualified under this provision: the Conservative Party, the Democratic Party, the Independence Party, the Republican Party, and the Working Families Party. Currently only these five parties are obligated to select their nominees for Supreme Court Justice

through the judicial district convention system specified by Section 6-106.[1]

Section 6-124 directs that each party's judicial district convention shall be comprised of delegates elected from the assembly districts in the September delegate primary. N.Y. Election Law § 6-124. Judicial districts contain as few as 9 assembly districts, and as many as 24. Pet. App. 104. Section 6-124 grants each political party substantial authority to determine the number of delegates allocated to each assembly district *Id.* at 11-12. The number of delegates elected from each judicial district accordingly varies, ranging from the 24 delegates elected to attend the Democratic Party's Fourth Judicial District convention, to the 185 delegates elected to attend the Republican Party's Tenth Judicial District convention. *See id.* at 105-06.

To run for judicial district convention delegate—that is, to be placed on the delegate primary ballot—a party member must submit to the Board a nominating petition with valid signatures of 500 party members residing in the same assembly district, all gathered during a 37-day period. *See* N.Y. Election Law §§ 6-134(4), 6-136(2)(i), 6-136(3); Pet. App. 12.

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[1] The two most recent gubernatorial election returns for New York State are available at http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_gov.pdf and http://www.elections.state.ny.us/NYSBOE/elections/2002/general/2002_gov.pdf, respectively; *see also* Pet. App. 97 n.2. In recent elections, the Green Party and the Right to Life Party have both come within several thousand votes of the 50,000-vote threshold. Political organizations failing to meet the 50,000 vote threshold are considered, under Election Law, "independent bodies." N.Y. Election Law § 1-104(12). An independent body may nominate candidates and place its name and that of its candidates on the general election ballot by submitting a petition with the requisite number of valid signatures (ranging from 500 to 15,000, depending on the office). *Id.* § 6-142.

One to two weeks after the delegate primary, each party's delegates are summoned to their respective party's judicial district convention. N.Y. Election Law § 6-158(5); Pet. App. 18, 116. At those conventions, delegates select the party's candidates for Supreme Court Justice in the November general election. *See* N.Y. Election Law § 6-126(2). Those nominated by the judicial district conventions appear as the parties' nominees on the general election ballot. Pet. App. 10. They are joined on the general election ballot by any independent candidate who submitted to the Board a timely nominating petition with (depending on the judicial district) 3,500 or 4,000 valid signatures. *See* N.Y. Election Law §§ 6-138–6-142.

2. In March 2004, respondents—disappointed judicial office-seekers, several New York voters, and Common Cause/NY—brought this Section 1983 action to challenge the constitutionality of New York's system for selecting party nominees for the office of Supreme Court Justice. *See* C.A. JA 1-36. Respondents alleged that New York's judicial district convention system was a "sham 'election' process" that "plac[ed] severe and unjustified burdens on candidates seeking to challenge candidates . . . backed by local Democratic or Republican party leaders," and thereby deprived "candidates . . . access to the ballot," "rank-and-file party members of their rights to associate to choose their party's candidates," and "all New York State voters their right to vote effectively." *Id.* at 1, 2-3. Respondents further alleged that this system denied voters and candidates "equal protection of the laws by imposing . . . a virtually insurmountable burden upon any challenger candidates for Supreme Court, while imposing a lesser burden on candidacies for . . . other elective offices." *Id.* at 3.

Respondents claimed that Sections 6-106 and 6-124 of the New York Election Law, which "established and defined" "[t]he judicial convention process," violated the First and Fourteenth Amendments and sought a declaration that

both provisions were unconstitutional "both facially and as applied to Plaintiffs." C.A. JA 9-10, 35. In addition to the declaration of invalidity, respondents also claimed entitlement to affirmative injunctive relief mandating the establishment of "a direct primary election" to select party nominees for Supreme Court Justice. *Id.* at 35.

After an evidentiary hearing, the district court found that Sections 6-106 and 6-124 violated the First Amendment and issued an injunction barring the Board "from enforcing New York Election Law § 6-106, and from using the procedures set forth in § 6-124." Pet. App. 185. The district court further mandated that "the nomination of Supreme Court Justices shall be by primary election until the legislature of the State of New York enacts a new statutory scheme." *Id.* Having concluded that the First Amendment alone "fully support[ed] the relief" respondents requested, the district court declined to consider respondents' Fourteenth Amendment equal protection claim. *Id.*

3. The Second Circuit affirmed, concluding that respondents had "demonstrated a clear likelihood of success on the merits of their First Amendment claim." Pet. App. 34. The court of appeals found in the First Amendment a right, belonging to "voters and candidates," to "a realistic opportunity to participate in [a political party's] nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest." *Id.* at 41-42. This right, the Second Circuit argued, "derive[d] directly from a line of cases limiting a State's power to structure its elections and regulate access to its ballot," including *Williams v. Rhodes*, 393 U.S. 23 (1968), *Bullock v. Carter*, 405 U.S. 134 (1972), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Pet. App. 42-43.

The Second Circuit divined from those decisions an "animating principle" of compulsory access that extends not only to general elections, but also "to each State-created or State-endorsed 'integral part of the election machinery.'"

Pet. App. 39 (quoting *United States v. Classic*, 313 U.S. 299, 318 (1941)). The State's provision of ready access to the general election ballot, the court held, was not itself sufficient to meet the State's First Amendment obligations: The court found that "one-party rule" prevails to such an extent within the State of New York that the ruling party's nominating phase must be viewed as "the 'crucial' stage of the electoral process," one that "'effectively controls the choice' at the general election." *Id.* at 52 (quoting *Classic*, 313 U.S. at 318), 55. Moreover, in the Second Circuit's view, the right conferred by the First Amendment is not merely to associate in the political arena at large, but rather the right to associate within the framework of the party of one's choice. *Id.* at 55 (rejecting suggestion that election procedure that compelled candidate to "abandon his political affiliation for a general election ballot position" could satisfy First Amendment). The Second Circuit found no great tension between granting a "challenger candidate" a right to associate within the political party of his choice and the "political party's [First Amendment right] to determine the structure and content of its own association." *Id.* at 51. Indeed, the Second Circuit could conceive of no "party interest that is weighty enough to justify excluding qualified party members from competing" for the party's nomination "or from associating with party-member candidates seeking those offices." *Id.* at 53.

Having determined that candidates and voters have a First Amendment right to participate meaningfully in the nominating process of the party of their choice, the Second Circuit proceeded to analyze the burdens on associational rights imposed by Sections 6-106 and 6-124 of the New York Election Law. Pet. App. 44. Notwithstanding the fact that it was reviewing the district court's conclusion that these provisions were *facially* invalid, the Second Circuit, following the district court's lead, adopted the point of view of a so-called "challenger candidate"—"a reasonably diligent candidate who, although possessing public support, lacks the resources

provided by a supportive political party"—and inquired whether Sections 6-106 and 6-124 imposed severe burdens on this particular class of individuals. *Id.* at 59, 60.

Without ever examining the text of the challenged statutes, the court of appeals concluded that "New York's [j]udicial [e]lection [p]rocess"—"the structure of the [delegate] primary election, its petitioning requirements, and the delegate lobbying process[—]severely burden First Amendment associational rights" of challenger candidates. Pet. App. 61. The court focused first on "the petition signature requirements for running a slate of delegates." *Id.* The court found that "[i]n order to participate in the primary election by running a slate of delegates, a judicial candidate must gather at least 9,000 signatures and as many as 24,000 within a 37-day period." *Id.* at 62. (A "surplus of signatures" over and above that required by another (unchallenged) provision of the Election Law was necessary, the court concluded, "to beat back challenges" to the petition.) An insurgent candidate also would need to recruit "between 32 and 124 individuals to run as delegates." *Id.* at 63. This, in the Second Circuit's view, was too much to ask of an insurgent candidate given the "large disparity in resources when competing against those favored by the party leadership." *Id.*

The court of appeals also noted the strong influence of party leaders in the ultimate selection of nominees at the judicial district convention. Indeed, the Second Circuit expressly endorsed the district court's factual findings that, although the elected delegates are uncommitted when they arrive at the judicial district conventions, "(1) county leaders select their party's nominees; (2) delegates merely endorse those choices; and (3) delegates do not require express commands to do so." Pet. App. 64. The court of appeals concluded that, notwithstanding their unpledged status, judicial delegates—even when vigorously lobbied by insurgent candidates—routinely end up simply rubber-stamping those anointed by party leaders. *See id.* at 66-69.

For the Second Circuit, the influence of party leaders over delegates typically recruited by those leaders, when coupled with the burdens associated with a challenger candidate running his or her own slate of delegates, "reduced to this bottom line: through a byzantine and onerous network of regulations employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment," and thereby "preclude[d] all but candidates favored by party leadership from seeking the nomination of their chosen party." Pet. App. 70 (internal quotation marks omitted). "It is virtually impossible—and perhaps absolutely impossible—for a candidate to satisfy this series of election laws." *Id.* at 63 (internal quotation marks omitted). The court of appeals therefore affirmed the district court's finding that "New York's judicial nominating process severely burdens the associational rights of candidates and voters alike." *Id.* at 70.

Having concluded that New York's "judicial nominating process" was not narrowly tailored to any compelling state interest, the court of appeals affirmed the district court's finding that Sections 6-106 and 6-124 were "unconstitutional on their face." Pet. App. 80. While acknowledging that "facial invalidation is strong medicine," the Second Circuit concluded that insofar as "New York's judicial nominating process excludes not just these plaintiffs, but all candidates lacking party support," "facial invalidation is proper." *Id.* (citing *Lerman v. Bd. of Elections*, 232 F.3d 135, 153 (2d Cir. 2000)). The court of appeals accordingly affirmed the district court's "enjoining the whole of sections 6-106 [and] 6-124." *Id.*

Finally, the court of appeals sustained the district court's affirmative relief: the installation of direct primary elections for party nominations for the office of New York Supreme Court Justice. *See* Pet. App. 82-83. Citing Section 6-110 of the New York Election Law, which provides for direct primary elections for judicial positions "except as provided for

herein," the Second Circuit reasoned that the equitable relief awarded was merely that which would have come into being by operation of law. *Id.* at 79. In any event, the district court concluded, it would have been "irresponsible" for the district court not to fill the "gaping hole in the State's electoral scheme" left by facial invalidation. *Id.* at 82.

SUMMARY OF ARGUMENT

The decision of the court of appeals is deeply flawed, in at least three respects:

I. The Second Circuit held that the First Amendment grants to "insurgent candidates" and the voters that support them "a realistic opportunity to participate in the nomination process" of the party of their choice—here, the parties' judicial district conventions. Pet. App. 41. Neither the courts below nor the respondents cite any authority that supports the proposition that the First Amendment grants to candidates and voters a right of compulsory access to party nominating conventions. And indeed, there is none; the First Amendment does not compel the State to intrude so deeply into political parties' decisions as to who will be their standard-bearers. To be sure, this Court has held that, because "an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), the First Amendment grants to candidates a right to a reasonable "opportunity . . . to wage a ballot-connected campaign," *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986). Accordingly, state laws that interpose "an absolute bar to candidacy" *may* violate the First Amendment. *Storer v. Brown*, 415 U.S. 724, 737 (1974) (finding no violation). Conversely, though, when state law leaves open to candidates a reasonable "opportunity to wage a ballot connected campaign," such as access to the general election ballot—as New York law indisputably does here—the Court has found that associational rights are not

burdened. *Munro*, 479 U.S. at 199. State laws that require a candidate to "channel [his] expressive activity" into a general election campaign, rather than a primary process, do not violate the First Amendment. *Id.*

Moreover, it is not clear that the First Amendment even *permits* the state-enforced access that the courts below held the First Amendment *requires*. This Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)). This Court accordingly has viewed skeptically any effort by the State to "adulterate [political parties'] candidate selection process." *Jones*, 530 U.S. at 581. But it was precisely this type of "adulteration" of the parties' judicial district conventions that the courts below commanded the New York Legislature to undertake.

II. Even positing, for purposes of argument, that candidates and voters have a First Amendment right of meaningful access to party nomination processes, the Second Circuit failed utterly to demonstrate that Section 6-106 and Section 6-124 "severely burden" that right. The court of appeals never looked to the language of the statutes respondents alleged to be unconstitutional. Instead, it looked to the "realities" of the "electoral scheme," Pet. App. 60, 61, and identified two severe burdens: the expense and effort involved in "running a slate of delegates" in the delegate primary, and the outsized influence party leaders have over the delegates' votes at the judicial district convention. *Id.* at 62; *see also id.* at 64-69. It is absolutely clear, however, that neither of those "burdens" is imposed by Section 6-106 or Section 6-124. Nothing in those statutes requires a candidate for New York Supreme Court Justice to "run a slate of delegates." *Id.* at 58. Nor do they grant to unidentified "party leaders" special

powers of persuasion over duly-elected delegates or otherwise compel those delegates to follow those leaders' commands. The "burdens" identified by the court of appeals are imposed not by state law, but by the private acts of persons competing for party nominations and those who support them. The First Amendment grants no right against private action.

The court of appeals compounded its error by holding that respondents had demonstrated Sections 6-106 and 6-124 to be facially invalid. Even under the relaxed standard applied to facial challenges brought under the First Amendment, the plaintiff must demonstrate at least that the challenged statutes are invalid in a substantial proportion of their applications. *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Here, the court of appeals found that test was satisfied based on its conclusion that Section 6-106 and Section 6-124 burden the associational rights of "all candidates lacking party support." Pet. App. 80. But the court of appeals never examined whether these "candidates lacking party support" constituted a substantial proportion of all candidates seeking party nominations for New York Supreme Court Justice. In the absence of such an analysis, the court of appeals should have restrained itself to the more measured response of an as-applied invalidation.

III. There was no basis for the district court's injunction mandating the installation of a system of direct primaries. *See* Pet. App. 184. Injunctive relief must be tailored to the injury it seeks to remedy. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996). If, in fact, it was Section 6-106 and Section 6-124 that imposed the severe burdens that the court of appeals supposed, then an injunction against enforcement of those statutes would have sufficed to alleviate those burdens. The Second Circuit's *post hoc* rationale for this extraordinary affirmative relief—that it merely mandated the outcome already required by Section 6-110 of the New York Election Law—is insufficient. It was the Board's job—not the federal

courts'—to fill the "gaping hole in the State's electoral scheme" opened by the courts' invalidation of Sections 6-106 and 6-124. Pet. App. 82. Because the New York Legislature specifically provided in 1921 that nominees for New York Supreme Court Justice should *not* be selected by direct primary, Section 6-110, which provides for primaries to select nominees for offices "except as provided" elsewhere in the Election Law, would not apply.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT COMPEL A STATE TO GRANT "INSURGENT CANDIDATES" ACCESS TO THE NOMINATION PROCESSES OF THE POLITICAL PARTY OF THEIR CHOICE

The court of appeals held that the First Amendment right of association guarantees to "insurgent candidates" and voters that support them "a realistic opportunity to participate in the nominating process" of the party of their choosing. Pet. App. 41. This Court's decisions, however, make clear that candidates' and voters' associational rights—and the State's corresponding obligation—are fulfilled when the State provides a reasonable avenue of access to the general election ballot to candidates (insurgent or not) who have demonstrated a modicum of public support. While the Fourteenth and Fifteenth Amendments mandate that state-sanctioned party nomination processes be untainted by invidious discrimination, this Court has never held that the *First Amendment* grants to candidates a right of unfettered access to those contests—contests which this Court has recognized often enough to be central to a political party's own associational interests. *See, e.g., Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). And with good reason: a political party is not a traditional public forum. Treating a political party as such—as respondents urged and the courts below did—is to destroy it. Respondents have no First Amendment entitlement to state action that interjects them into the midst of a

party's decision as to who will (and who will not) be the party's standard-bearer in the general election.

A. Respondents' First Amendment Rights Are Satisfied By Reasonable Access To The General Election Ballot

1. No provision of federal law requires that the States select their judges—or, for that matter, any of their officers—through popular elections. *See Republican Party v. White*, 536 U.S. 765, 788 (2002) (acknowledging the "power to dispense with elections [of judges] altogether"); *Fortson v. Morris*, 385 U.S. 231, 233-36 (1966) (federal law does not "compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly"). To the extent that they choose to select their officers through elections, "States have a major role to play in structuring and monitoring the election process." *Jones*, 530 U.S. at 572; *see also Bullock v. Carter*, 405 U.S. 134, 140-41 (1972) ("we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections"). States may "require parties to use the primary format for selecting their nominees," *Jones*, 530 U.S. at 572, or "may insist that intraparty competition be settled before the general election . . . by party convention." *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974).

In exercising their authority to structure state election processes, the States, of course, must "act within limits imposed by the Constitution," including the First Amendment's guarantee of freedom of association. *Jones*, 530 U.S. at 573. This Court has long held that "'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (quoting *Roberts v. U.S. Jaycees*, 468 U.S.

609, 622 (1984)); *accord, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). "[T]he freedom of political association," including "partisan political organization," "is an integral part of this basic constitutional freedom." *Tashjian v. Republican Party*, 479 U.S. 208, 214, 217 (1986). Indeed, this Court has held that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Jones*, 530 U.S. at 574.

Recognizing that "an election campaign is an effective platform for the expression of views on the issues of the day," and that a "candidate serves as a rallying point for like-minded citizens," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), this Court has invalidated on First Amendment grounds unreasonable restrictions on access to a general election ballot, concluding that such restrictions "burden[ed] . . . the right of individuals to associate for the advancement of political beliefs." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). "The right to form a party for the advancement of political goals," the Court reasoned, "means little if a party can be kept off the election ballot." *Id.* at 31.

This is not to say that all—or even many—state regulations limiting access to a general election ballot will violate the associational rights of candidates and those who would vote for them. This Court has recognized that "'there must be a substantial regulation of elections if they are to be fair and honest,'" and that, accordingly, "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson*, 460 U.S. at 788 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). But when a "restriction . . . limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status," it risks transgressing constitutional limits on state power. *Id.* at 793.

Thus in *Williams*, the Court set aside "a series of election laws [that] made it virtually impossible for a new political party . . . to be placed on the state ballot" for the presidential elections. 393 U.S. at 24. This regime, the Court concluded, "g[a]ve the two old, established parties a decided advantage over any new parties struggling for existence and thus place[d] substantially unequal burdens on . . . the right to associate." *Id.* at 31. The Court found the handover of "a complete monopoly" on power to "two particular parties—the Republicans and the Democrats"—to be antithetical to "the core of our electoral process and of the First Amendment freedoms." *Id.* at 32.

Similarly, in *Anderson*, the Court struck down another Ohio law that required independent candidates—but not those nominated by the Democratic or Republican parties—to file petitions to be placed on the ballot many months before the general election. 460 U.S. at 806. The Court concluded that Ohio's early deadline "places a particular burden on an identifiable segment of Ohio's independent-minded voters" and reinstated the district court's conclusion that the Ohio statute "imposed an impermissible burden on the First Amendment rights of [independent candidate] Anderson and his supporters." *Id.* at 783, 792.

2. While this Court previously has struck down restrictions on access to a general election ballot on First Amendment grounds, it *never* has held that candidates—insurgent, or otherwise—have a First Amendment right of untrammeled access to a political party's nomination processes. To the contrary, this Court's decisions make clear that reasonable access to a general election ballot—as New York law indisputably provides here—is all that the First Amendment requires the State to provide.

a. The Second Circuit cites no pertinent authority whatsoever for its revolutionary conclusion that insurgent candidates and voters who support them have a First Amendment right to associate in the context of a political party's candi-

date-selection processes—to wit, "a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest." Pet. App. 41-42. The decisions on which the court of appeals relied establish either a right only to reasonable access to the general election ballot, or an entirely different right under the Fourteenth and Fifteenth Amendments to be free from invidious discrimination in the exercise of the franchise. Neither of those rights is implicated here.

The Second Circuit suggested that its new constitutional entitlement "derive[s] directly from a line of Supreme Court cases limiting a State's power to structure its elections and regulate access to its ballot": *Williams*, *Anderson*, and *Bullock*. Pet. App. 42. The court of appeals concluded that "[t]hese cases establish that the First Amendment prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." *Id.* at 44. But, as noted above, *Williams* and *Anderson* concerned challenges only to Ohio laws restricting access to the ballot for the *general election*. *See Anderson*, 460 U.S. at 786 (recounting that, under the challenged statute, "no independent candidate may . . . seek to place his name on the *general election ballot*" (emphasis added)); *Williams*, 393 U.S. at 24 (same). Neither *Williams* nor *Anderson* even remotely suggests that one seeking a political party's nomination and his and her rank-and-file supporters have a First Amendment right to participate in that party's candidate-selection processes.

Bullock v. Carter similarly fails to offer support for the Second Circuit's novel constitutional right. Though that case (unlike *Williams* and *Anderson*) did involve a challenge to a restriction on access to a party nomination process—specifically, a filing fee for the Texas Democratic Party's primary ballot—as the Second Circuit itself recognized, that case was decided not under the First Amendment, but rather

"pursuant to the Equal Protection Clause of the Fourteenth Amendment." Pet. App. 43 (citing *Bullock*, 405 U.S. at 144, 145-49). This reading is confirmed by this Court's own view of the case as "resting on the Equal Protection Clause of the Fourteenth Amendment." *Anderson*, 460 U.S. at 786-87 n.7; *see also id.* at 793 n.15 ("the filing fees were unconstitutional because of the 'obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community" (quoting *Bullock*, 405 U.S. at 144)). Thus, *Williams*, *Anderson*, and *Bullock* offer no support whatsoever for the Second Circuit's conclusion that the *First Amendment* compelled the Board of Elections to grant respondents access to the political parties' nomination processes.

b. Unable to find a case in which this Court has found a *First Amendment* right to participate in a political party's candidate-selection process, the Second Circuit instead divined from this Court's decisions in *United States v. Classic*, 313 U.S. 299 (1941), and *Terry v. Adams*, 345 U.S. 461 (1953), an "animating principle" that "constitutional protection extends" not just to the general election, and indeed, not just to elections, but rather "to each State-created or State-endorsed 'integral part of the election machinery.'" Pet. App. 39 (quoting *Classic*, 313 U.S. at 318). Therefore, the court reasoned, the First Amendment right of association that applies at the general election stage applies with equal force to party nomination processes. Pet. App. 41; *see also* Br. in Opp. at 19-20. *Classic* and *Terry*, however, do not sweep so broadly.

Classic concerned the interpretation of two federal criminal laws that prohibited the willful violation of rights secured by the Constitution. *See* 313 U.S. at 321 n.4, 325 n.9. The question for the Court was whether ballot fraud perpetrated by election officials in the course of a Louisiana primary election to nominate a candidate of the Democratic Party for representative in Congress was encompassed by those criminal statutes. The Court concluded that, inasmuch

as the right of the people to vote for their representatives in Congress is established by Article I, Section 2 of the Constitution, ballot fraud in a primary election was covered by the statutes. *Id.* at 324-25. The fact that the fraud had occurred in a primary election was immaterial; because the State had made the primary election "an integral part of the procedure of choice," "the right of the elector to have his ballot counted at the primary is . . . included in the right protected by Article I, § 2." *Id.* at 318.

For its part, *Terry* concerned whether "the Fifteenth Amendment's prohibition on race-based voting exclusions applied . . . to a primary election run by a private club called the Jaybird Democratic Association." Pet. App. 39. And as this Court recently observed, *Terry* held "only that, when a State prescribes an election process that gives a special role to political parties . . . the parties' discriminatory action becomes state action under the Fifteenth Amendment." *Jones*, 530 U.S. at 573.

But the fact that rights secured by the Fourteenth and Fifteenth Amendments apply with equal force to both general and primary elections does not nearly establish that *First Amendment* associational rights in the general and party nomination phases are similarly coterminous. While the dimensions of the substantive right secured by the Fourteenth and Fifteenth Amendments—the right to be free from state acts of invidious discrimination in the exercise of the franchise—are not dependent on the context in which the state action occurs, the First Amendment is not so one-dimensional. Whether one has a First Amendment right to speak or associate depends very much on the context in which that right is asserted. An insurgent candidate's First Amendment speech and associational rights are very strong when she is in a public park, but much less so when she is in a public prison. *Compare Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), *with Jones v. N.C. Prisoners' Union*, 433 U.S. 119 (1977). Her Fourteenth

Amendment right to be free from state acts of invidious discrimination, however, applies with equal force in both contexts. *See Johnson v. California*, 543 U.S. 499 (2005) (applying strict scrutiny in review of California prisons' racial segregation of inmates).

It is therefore unsurprising that, in *Jones*, the Court rejected precisely the interpretation of *Terry* advanced here by respondents—i.e., as establishing in voters a "First Amendment associational interest" to be included in "a state-required, state-financed primary election." *Jones*, 530 U.S. at 573 n.5. *Terry*, the Court recognized, "simply prevent[s] exclusion" of voters where that exclusion "violates some independent constitutional proscription." *Id.* *Classic* and *Terry* thus shed no light at all on whether exclusion of an insurgent candidate from a political party's candidate-selection process would violate the candidate's First Amendment rights.[2]

c. The First Amendment concern at the core of this Court's decisions in *Anderson* and the other ballot access cases—that "election campaigns [ ] not [be] monopolized by

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[2] Nor do the additional cases cited by respondents in their brief in opposition. *See* Br. in Opp. at 19-20. *Moore v. Ogilvie*, 394 U.S. 814 (1969), concerned restrictions on access to a general election ballot that were held to discriminate against rural voters in violation of the Equal Protection Clause. *Id.* at 819. While *Lubin v. Panish*, 415 U.S. 709 (1974), did concern a restriction on access (a filing fee) to a primary ballot, the decision was grounded on the equal protection rationale set forth in *Bullock*. *Id.* at 718. Moreover, in *Lubin*, the Court relied explicitly on the facts that the State provided no "alternative means of gaining access to the ballot" and that failure to pay the filing fee amounted to a "disqualification from running for office." *Id.* *Kusper v. Pontikes*, 414 U.S. 51 (1973), is completely inapposite. That case did not involve a restriction on access to any ballot, but rather an Illinois statute prohibiting a person "from voting in the primary election of a political party if he ha[d] voted in the primary of any other party within the preceding 23 months." *Id.* at 52. Respondents here allege no restriction on their ability to vote in the delegate primaries held in their respective assembly districts.

the existing political parties" at the expense of minor parties and independents (460 U.S. at 794) is not remotely implicated by the *intra-party* nominating process at issue in this case. Unlike the petitioners in *Anderson* and *Williams*, under New York law, the respondent would-be candidates each easily could have placed their names on the general election ballot, *see* N.Y. Election Law § 6-138, but they made no effort to do so. As even the district court recognized, *see* Pet. App. 160-61, this Court's decisions make clear that providing candidates with the opportunity to access and associate with the relevant electorate—an opportunity of which no respondent here availed herself—is all that the First Amendment requires.

In cases where the Court has struck down restrictions on access to the ballot, it has consistently emphasized that the state restriction, if not satisfied, constituted an absolute bar to candidacy. For instance, in *Lubin*, the Court held a candidate filing fee to violate principles of equal protection, but only in "[t]he absence of reasonable alternative means of ballot access." 415 U.S. at 718. Similarly, in *Anderson*, the Court noted that "the challenged Ohio statute totally exclude[s] any candidate" who failed to comply with an absurdly early filing deadline. 460 U.S. at 792. And in *Williams*, where the Court addressed a challenge to "various restrictive provisions [that] ma[de] it virtually impossible for any party to qualify on the ballot except the Republican and Democratic parties," the Court found noteworthy the fact that "Ohio laws make no provision for ballot position for independent candidates." 393 U.S. at 24. In tandem, these restrictions amounted to the grant of "a complete" and "permanent monopoly" to the established parties. *Lubin*, *Anderson*, and *Williams* thus all strongly suggest that ballot access restrictions will not violate the First Amendment where the State leaves in place a reasonable alternative means of accessing the general election ballot; to violate the First Amendment the ballot restriction must present "an absolute bar to candidacy." *Storer v.*

Brown, 415 U.S. 724, 737 (1974) (upholding state one-year disaffiliation requirement for ballot access for independent candidates).

If there were any doubt about that proposition, this Court's decision in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), would resolve it. *Munro* upheld against a First Amendment challenge Washington State's requirement that, to gain access to the general election ballot, a candidate must receive at least one percent of all votes cast in the State's multi-party "blanket primary" election. 479 U.S. at 191-93 (describing Washington's blanket primary system). Analyzing the Socialist candidate's claim of right of access to the general election ballot against the backdrop of the rejection of similar claims in *Jenness v. Fortson*, 403 U.S. 431 (1971), *American Party of Texas*, and *Storer*, the Court found dispositive the fact that "Washington virtually guarantees what the parties challenging the Georgia, Texas, and California election laws so vigorously sought—candidate access to a statewide ballot." *Munro*, 479 U.S. at 199. "This," the Court stated, "is a significant difference." *Id.* Given that the State permitted ready access to the entire relevant electorate in the blanket primary, "there are no state-imposed obstacles impairing voters in the exercise of their choice." *Id.* That the State provided the opportunity to associate only in the blanket primary, and not in the general election, was irrelevant to the First Amendment analysis: "It can hardly be said that Washington's voters are denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election." *Id.*

A fortiori, New York can hardly be said to have infringed respondents' "freedom of association because [respondents] must channel their expressive activity into a campaign at the [general election] as opposed to the [primary]." *Munro*, 479 U.S. at 199. *Munro* establishes beyond cavil that, so long as the State provides reasonable access to the entire relevant electorate—whether in a blanket primary or a

general election—it meets its obligation under the First Amendment to provide voters an opportunity "to band together in promoting among the electorate candidates who espouse their political views." *Jones*, 530 U.S. at 574.

Respondents will doubtless contend—as the courts below suggested—that the opportunity to run on the general election ballot does not constitute a "real" opportunity because (1) it would require them to abandon their party affiliation, and (2) "one-party rule" is so entrenched in the State of New York that the outcome of the general election is predetermined. Pet. App. 40, 52, 161. Neither rationale can support the conclusion that the general election ballot presents an inadequate opportunity to associate with voters. As to first rationale, it is bottomed only on a stray statement in this Court's decision in *Bullock*, *see* 405 U.S. at 145-46, which this Court has recognized turns on principles of equal protection. *See Anderson*, 406 U.S. at 486-87 n.7. The *Bullock* Court may have been correct to conclude that it violated the *Equal Protection Clause* to compel impecunious candidates to run as independents, while wealthy candidates could run under the banner of their choice. But that does not demonstrate that a requirement of disaffiliation substantially burdens associational rights. To the contrary, just two Terms ago, this Court held that a requirement that one disaffiliate from his current party "prior to participating in [another] party's primary minimally burdens voters' associational rights." *Clingman v. Beaver*, 544 U.S. 581, 592 (2005). Indeed, some 20 States (New York not among them) elect judges in nonpartisan elections—elections in which the candidates' party affiliations (if any) are not listed on the ballot, *see Republican Party of Minn. v. White*, 416 F.3d 738, 779 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 1165 (2006)—and the constitutionality of such elections is unquestioned. *Storer*, 415 U.S. at 741 (endorsing in principle a nonpartisan judicial primary); *see also Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch

ultimately depends on its reputation for impartiality and non-partisanship."). The fact that respondents would not be listed on the general election ballot as members of the party of their choice would not prohibit them from announcing their party affiliation to the electorate and would not otherwise limit the candidates' ability to associate with like-minded voters.

Respondents' second rationale for spurning the general election ballot—that New York, like pre-World War II Louisiana or Baathist Iraq, is dominated by "one-party rule," Pet. App. 61—cannot be taken seriously. The fact that the current Mayor of the City of New York and his predecessor in office are both Republicans, and that, in the 2006 elections, two Republican incumbents from upstate districts lost their congressional seats to Democratic challengers ought to be evidence enough that the grip of the "one party" has loosened enough to permit competitive general elections. *See* New York State Board of Elections, 2006 Elections Results for Representative in Congress, http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_cong.pdf. In any event, respondents' second rationale presupposes that they have a First Amendment right not just to associate with voters, but to do so on terms deemed to be competitive. *Munro*, however, is quite clear that in the absence of a state restriction that poses an absolute bar to ballot access, there is no First Amendment violation.[3]

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[3] Even assuming that the First Amendment does guarantee insurgent candidates an independent right of access to party primary ballots along the lines suggested by the separate concurrence in *Clingman v. Beaver*, 544 U.S. 581, 599-600 (2006) (O'Connor, J., concurring in part and concurring in judgment) and the dissenting opinion in *Burdick v. Takushi*, 504 U.S. 428, 442-50 (1991) (Kennedy, J., dissenting)—and as *Munro* establishes, it does not—respondents suggest no reason why *that* right would extend to other nominating processes employed by political parties, such as the judicial district conventions enjoined by the decisions below. As the Second Circuit itself recognized, it is only when a State "'chooses to tap the energy and legitimizing power of the democratic

B. Respondents' Supposed Right Of State-Enforced Access To Political Parties' Candidate-Nomination Processes Trenches Upon The Parties' Associational Rights To Determine Their Standard-Bearers

1. The Second Circuit held that "the First Amendment prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." Pet. App. 44. At least as applied to party nomination processes, this is plainly incorrect. It was long ago established that the freedom of partisan political association itself "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981); *accord Tashjian*, 479 U.S. at 214. A political party thus enjoys not just the right to associate with citizens, but also "the right *not* to associate." *Jones* 530 U.S. at 574 (emphasis added). Moreover, this Court has observed that a political party's "right to exclude" is at its apogee when the

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[Footnote continued from previous page]

process'" that "'it must accord the participants in that process the First Amendment rights that attach to their roles.'" Pet. App. 34 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002)). If the First Amendment granted candidates access to party nomination processes at all, it would do so only in cases like *Clingman* where the State dictates that political parties choose their candidates by primary election. The Constitution, however, does not require that parties select their candidates by primary election. Indeed, "[i]t is too plain for argument" that "the State . . . may insist that intraparty competition be settled before the general election by primary election *or by party convention*." *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (emphasis added); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 n.5 (2000) ("If the 'fundamental right' to cast a meaningful vote were really at issue in this context, [a blanket primary] would not only be constitutionally permissible but constitutionally required, which no one believes.").

party is engaged "in the process of selecting its nominee." *Id.* at 575. "Under our political system," the "select[ion of] the candidates for public office to be offered to the voters at the general elections" is among the party's most "basic function[s]." *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). The outcome of the nomination contest "often determines the party's positions on the . . . issues of the day," and a party's candidates are charged with carrying the party's political message to the electorate. *Jones*, 530 U.S. at 575. The party, in turn, becomes identified to no small extent—and in some cases completely—with the messages espoused by its candidates. *See id.*

Because the candidate-selection process is so central in determining both the content and, ultimately, the currency of a party's political message, this Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Jones*, 530 U.S. at 575 (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)). While the States have wide latitude in determining the structure of party nomination processes, *see Burdick v. Takushi*, 504 U.S. 428, 433 (1992), and indeed have the authority to mandate that political parties select their candidates through primary elections, *see Am. Party of Tex.*, 415 U.S. at 781, the States may not act "'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" *Eu*, 489 U.S. at 227 (quoting *Tashjian*, 479 U.S. at 224); *see also Eu*, 489 U.S. at 229 ("[A] political party's 'determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution.'" (quoting *Tashjian*, 479 U.S. at 224)). The First Amendment reserves a "special place" for the parties' internal candidate selection processes and, ac-

cordingly, protects it from improper "adulterat[ion]" at the hands of external regulation. *Jones*, 530 U.S. at 575, 581.[4]

2. The courts below determined that the First Amendment entitled respondents to state action that would enable insurgent candidates "to compete" in the State's chosen nomination process "by garnering support among rank-and-file members," and would thereby place a "check" on, and diminish the influence of, "party leaders." Pet. App. 45, 161, 183. Short of establishing a system of primaries—which, indisputably, the First Amendment does not *require*, *see Am. Party of Tex.*, 415 U.S. at 781—it is not clear that the First Amendment would *permit* the State to moderate the party nomination process in a way that satisfies respondents' demands.

Efforts to diminish the influence of party leaders are highly problematic. It is axiomatic that the First Amendment does not permit a State to favor the speech activities of one class of candidates over another. *See Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 190 (1999) (holding government could not restrict advertising of private casinos while allowing advertising by tribal casinos); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) ("The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker."). Moreover, any state effort to silence party leaders would appear to be foreclosed by this Court's decision in *Eu*,

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[4] *See also Jones*, 530 U.S. at 587 (Kennedy, J., concurring) ("It may be that organized parties, controlled—in fact or perception—by activists seeking to promote their self-interest rather than enhance the party's long-term support, are shortsighted and insensitive to the views of even their own members. A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free association, however, this is an issue for the party to resolve, not for the State.").

which invalidated a state law that prohibited the party leadership from endorsing particular candidates. *See* 489 U.S. at 216.

But even content-neutral restrictions on the parties' conduct of their judicial district conventions would, under this Court's precedents, raise serious constitutional questions. This Court has historically been very solicitous of the right of political parties to control their internal candidate selection processes. In *La Follette*, for example, the Court upheld the National Democratic Party's refusal to seat Wisconsin's slate of delegates to the Democratic National Convention for failure to conform to party delegate-selection rules, holding that the party's "choice among the various ways of determining the makeup of a State's delegation to the party's national convention" was protected by the First Amendment. *See* 450 U.S. at 121-24. And in *Tashjian* and *Jones*, the Court held that political parties had the First Amendment right to opt out of, respectively, closed primaries and blanket primaries. *Tashjian*, 479 U.S. at 215-16; *see also Jones*, 530 U.S. at 574-75. *But see Clingman*, 544 U.S. at 591-97 (upholding semi-closed primaries against First Amendment challenge). The State violated the First Amendment in those cases by "plac[ing] limits upon" the party's decision as to whom it would "invite to participate" in its candidate selection processes. *Tashjian*, 479 U.S. at 215-16; *see also Jones*, 530 U.S. at 581 (State violated First Amendment when it forced political parties to "adulterate their candidate selection process").

The district court's injunction here requires the New York State Legislature to undertake precisely the type of "adulterat[ion]" of the "candidate selection process" that *Jones* prohibited. *See* Pet. App. 183. If there is any daylight between this Court's constitutional proscription of state interference in parties' candidate selection processes, and the Second Circuit's prescription of the same, it is a narrow band, indeed.

II. The New York Statutes Are Not Facially Invalid

Even if one assumes the existence of a First Amendment right on the part of insurgent candidates to participate meaningfully in a political party's nominating processes, neither Section 6-106 nor Section 6-124 imposes any substantial burden on that "right," let alone the "severe burden" necessary to justify the application of strict scrutiny. *See Clingman*, 544 U.S. at 593 ("minor barriers between voter and party do not compel strict scrutiny"). The "burdens" on associational activity the Second Circuit identified are imposed not by Sections 6-106 or 6-124, but rather are the result of purely private action. There is no First Amendment remedy for purely private restrictions on speech. *See Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."). But even if respondents could identify some burden imposed by the state laws here at issue—and they cannot—they have not remotely demonstrated that those statutes burden speech in such a substantial proportion of their potential applications that the law must be deemed invalid on its face.

A. The New York Statutes Impose No Significant Burden On Respondents' Associational Interests

The Second Circuit examined "the reality of Supreme Court elections in present-day New York," Pet. App. 10, and located "severe burdens" in (1) the expense and effort required to run "a slate of delegates" who have allegiance only to the candidate "running" them, and (2) the overwhelming influence that party leaders wield over the votes the delegates ultimately cast at the judicial district convention. *Id.* at 57, 61; *see also id.* at 62-70. Neither purported burden on respondents' supposed right to participate in party nomination processes is affixed by state law.

As to the first "burden," the court of appeals envisioned a scenario in which those who wish to serve as a New York Supreme Court Justice recruit "a slate of delegates to run on their behalf, with an eye toward placing those delegates at the judicial nominating convention so that they can cast their votes in favor of the candidate with whom they are affiliated." Pet. App. 11. To run such a "slate," the court determined, an insurgent candidate would have to (1) recruit dozens of individuals to run as delegates; (2) "gather at least 9,000 signatures and as many as 24,000 within a 37-day petition circulating period" to place those recruits on the ballot; and (3) because candidates for delegate "may not indicate on the ballot the judicial candidate with whom they are affiliated," "educate voters in each assembly district as to the delegates with whom [she is] affiliated." *Id.* at 13, 62-63. Taken together, the court held, the requirements for running a slate of delegates "severely burden a judicial candidate's ability to access the primary election stage of the electoral process." *Id.* at 61.[5]

Neither Section 6-106 nor Section 6-124, however, makes any mention of running a slate of delegates. Section 6-106 says simply that "[p]arty nominations . . . shall be made by the judicial district convention." N.Y. Election Law § 6-106. Section 6-124 specifies that the convention shall be comprised of delegates elected from each assembly district in

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[5] It is obvious enough that, though it might be helpful to winning the party's nomination, a "slate of delegates" is not required merely "to participate" in the judicial district convention. Thus it seems that the court of appeals posited not simply a right "to participate in the nominating process," Pet. App. 41, or even "the right . . . to compete for their major party's nomination," *id.* at 161, but rather a right to a reasonable chance of winning the party's nomination at the convention. The First Amendment's right of political association—the right of "citizens to band together in promoting among the electorate candidates who espouse their political views," *Jones*, 530 U.S. at 574—of course does not encompass a right to prevail in an electoral contest.

the delegate primary, but imposes nothing resembling a requirement that a judicial candidate run a slate of delegates. *See id.* § 6-124. Indeed, Section 6-124 does not envision the judicial candidate's participation at all; the judicial district convention system was crafted in 1921 specifically to remove candidates from "bare-knuckled primary elections."[6] Pet. App. 9. The requirement that an insurgent candidate run a slate of delegates is practical rather than legal; it describes what an insurgent candidate might need to do to upset at the judicial district convention a candidate supported by a highly organized and effective political party. Neither Section 6-106 nor Section 6-124 requires that candidates run a slate of delegates in order to participate in party nomination processes, and it was thus manifest error for the Second Circuit to conclude that those statutes imposed this "Procrustean requirement" on insurgent candidates. *Id.* at 63.

As to the second "burden," the court of appeals observed that "county leaders select their party's nominees" and then party-sponsored delegates elected to the judicial district convention "merely endorse those choices." Pet. App. 64. The court of appeals also noted that party leaders sometimes prohibited insurgent candidates from lobbying delegates at the judicial district convention, further solidifying the influence of party leaders over the delegates. *Id.* at 69. The pervasive influence of party leaders, the court concluded, had permitted party leaders to arrogate to themselves the nomination power and "transformed a de jure decision into a de facto appointment." *Id.* at 70.

The key word in the Second Circuit's foregoing analysis is "facto," for it is absolutely clear that neither Section 6-106

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[6] It is for this reason—not because running a slate of delegates is burdensome—that petitioner Kellner testified that "'the idea that an individual candidate would go out and recruit delegate[] candidates and run delegates pledged to that candidate in the primary is not the system and it twists the design of the system on its head.'" Pet. App. 63.

nor Section 6-124—the relevant *jure*—grants to "party leaders" special powers of persuasion over delegates. To the contrary, as the court of appeals observed, state law actually prohibits a delegate from formally pledging herself to a candidate prior to the election. Pet. App. 63. As amply demonstrated by the fact that respondent López Torres received 25 votes at a 2002 judicial district convention, *see id.* at 69, delegates are free to vote for the candidate of their choice. Neither Section 6-106 nor Section 6-124 even the least bit interferes with, let alone influences, the delegates' nomination decisions. The Second Circuit erred when it attributed to Sections 6-106 and 6-124 the unsurprising influence party leaders hold over the delegates they sponsor.[7]

B. Respondents Have Failed To Proffer A Sufficient Basis For Facial Invalidation Of The New York Statutes

Based on "record evidence . . . that New York's judicial nominating process excludes not just [respondents], but all candidates lacking party support," the court of appeals affirmed the "facial invalidation" of Sections 6-106 and 6-124. Even under the somewhat relaxed standard applied to facial challenges in the First Amendment context, *see Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003), the courts below presented a glaringly insufficient factual basis for facial invalidation of a statute—a remedy this Court has cautioned should be "employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

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[7] To the extent that respondents contend that the timing of the delegate convention imposes another "severe" burden by limiting insurgent candidates to an "unrealistically brief" period of time in which to lobby delegates, Pet. App. 18, that contention is answered by the fact that the timing of the judicial district conventions is set not by Section 6-106 or Section 6-124, but rather Section 6-158(5), a provision the constitutionality of which neither court below addressed.

Assuming that respondents could demonstrate that either Section 6-106 or Section 6-124 somehow excluded them from the party nomination processes, facial invalidation of those statutes would be appropriate only upon a showing that the laws restrict "a 'substantial' amount of protected free speech 'judged in relation to the statute's plainly legitimate sweep.'" *Hicks*, 539 U.S. at 118-19 (quoting *Broadrick*, 413 U.S. at 615); *see also New York v. Ferber*, 458 U.S. 747, 771 (1982) (approving facial invalidation when a statute "reaches a substantial number of impermissible applications"). Here respondents adduced no evidence whatsoever to support the proposition that the number of "candidates lacking party support" who were purportedly excluded from the nomination process by Sections 6-106 and 6-124 is "substantial" when compared to "the statute's plainly legitimate sweep," i.e., the number of candidates for whom Sections 6-106 and 6-124 posed no impediment to participation in the nomination process. Perhaps there are dozens upon dozens of would-be justices like respondent López Torres who would have pursued a party nomination in the absence of the "severe burdens" identified by the courts below. Perhaps not. In any event, before uncorking the "strong medicine" of facial invalidation, the courts below were obligated at least to perform the analysis. And in the absence of such an analysis, it was error for the courts below to move past the more measured response of holding the challenged statutes to be invalid as applied to respondents.

III. The Courts Below Lacked Authority To Mandate The Holding Of Primary Elections

Even if Sections 6-106 and 6-124 were facially invalid, there still would be no conceivable justification for the district court's extraordinary decision to mandate as a "temporary remedy" the implementation of primary elections to choose party nominees for New York Supreme Court Justice.

The scope of a court's award of prospective relief always must be bounded by the scope of the proven threatened injury. *Lewis*, 518 U.S. at 357 (that "a plaintiff demonstrated harm from one particular inadequacy in government administration" does not authorize a court "to remedy *all* inadequacies in that administration" (emphasis in original)); *Missouri v. Jenkins*, 515 U.S. 70, 88, 89 (1995) ("[T]he nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation" (citation and internal quotation marks omitted)). Accordingly, when a statute is determined to be facially invalid, an injunction against its enforcement generally will suffice to cure any injury the statute might threaten. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (affirming lower courts' enjoinment of public school policy as facially violative of the First Amendment); *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997) (affirming the district court's preliminary enjoinment of portion of the Communications Decency Act of 1996 as facially invalid).

Notwithstanding this Court's clear limitations on inferior courts' exercise of their remedial powers, the district court concluded that an injunction against all enforcement of Sections 6-106 and 6-124 was inadequate to "afford the plaintiffs relief." Pet. App. 183. The "least intrusive" "temporary remedy," the district court concluded, was "to require a direct primary election." *Id.* at 183-84.

Reviewing this affirmative relief, the court of appeals made no effort to connect the district court's remedy to respondents' alleged injury. Nor could it: If respondents were correct that Sections 6-106 and 6-124, by operation of law, imposed severe burdens on their associational rights, an injunction against the enforcement of those statutes, without more, would have sufficed to alleviate those state-imposed burdens.

The court of appeals instead sustained the court-ordered primaries principally on the ground that the district court had

mandated merely the same result as that dictated by the so-called catch-all provision of the New York Election Law. *See* N.Y. Election Law § 6-110 ("All other party nominations of candidates for offices . . . , except as provided herein, shall be made at the primary election."). The Second Circuit reasoned that, in the absence of Sections 6-106 and 6-124, Section 6-110 required the State to hold primary elections even in the absence of the district court's award of affirmative relief. Pet. App. 82. "[T]he default nature of section 6-110 would have resulted in a primary election by operation of law." *Id.*

Whether the court of appeals accurately construed Section 6-110 is debatable. It would be a strange result if Section 6-110 compelled precisely the primaries that the New York Legislature, in 1921, had so clearly rejected. The court of appeals, however, short-circuited any such debate, arrogating to itself the power to interpret Section 6-110 in the first instance—a power that, under New York law, rests with the Board. *See* N.Y. Election Law §§ 3-102, 3-104. Even if the Second Circuit's interpretation of Section 6-110 is completely correct, it is the Board's mistake to make in the first instance, and the court of appeals had no authority to correct that "error" before it had been made. The mandate of direct primaries is precisely the sort of "judicial legislation" this Court has instructed inferior courts to avoid, *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329-30 (2006) (*per curiam*), and, accordingly, should be vacated.

CONCLUSION

The decision of the court of appeals should be reversed and the injunction of the district court should be vacated.

Respectfully submitted.

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76

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

STATEMENT 1

1. The Operation of New York's Statutory System 3

a. The Delegate-Selection Phase 5

b. The Nominating Conventions 10

c. General Elections 11

d. Judge Margarita López Torres - An Example of the System in Action 12

2. Proceedings Below 15

SUMMARY OF ARGUMENT 16

ARGUMENT 20

I. NEW YORK'S STATUTORY SCHEME IMPOSES SEVERE BURDENS ON THE ASSOCIATIONAL AND VOTING RIGHTS OF PARTY MEMBERS 20

A. The Statutes Severely Burden Party Members' Rights to Associate with One Another 21

B. The Statutes Severely Burden Party Members' Rights to Associate with Candidates for Their Party's Nomination 24

II. THE COURT SHOULD APPLY STRICT SCRUTINY 32

A. The State Imposes Its Convention System on All Parties 32

B. A Convention System Is Neither Constitutional Nor Unconstitutional *Per Se* 35

C. The Severe Burdens Found by the Lower Courts Flow from New York's Statutory Scheme, Not from Private Conduct 36

III. NEW YORK'S STATUTES ARE NOT NARROWLY TAILORED TO ADVANCE COMPELLING—OR EVEN LEGITIMATE—STATE INTERESTS 39

A. The State's Asserted Interests Do Not Justify the Burdens Imposed by New York's Statutory Scheme 39

B. The Interests Asserted by Other Petitioners Do Not Justify the Burdens Imposed by New York's Statutory Scheme 41

IV. THE SECOND CIRCUIT'S DECISION DOES NOT CAST DOUBT ON THE HISTORICAL OR CURRENT USE OF NOMINATING CONVENTIONS 43

V. PETITIONERS' NEW ARGUMENTS ABOUT FACIAL INVALIDITY AND REMEDY ARE UNPERSUASIVE 47

CONCLUSION 49

TABLE OF AUTHORITIES

CASES

American Party of Texas v. White,
415 U.S. 767 (1974) 18, 31, 35, 42, 44

Anderson v. Celebrezze, 460 U.S. 780 (1983) ..... *passim*

Bachur v. Democratic National Party,
836 F.2d 837 (4th Cir. 1987) 33, 34

Bartnicki v. Vopper, 532 U.S. 514 (2001) 47

Buckley v. Valeo, 424 U.S. 1 (1976) 28

Bullock v. Carter, 405 U.S. 134 (1972) ..... *passim*

Burdick v. Takushi, 504 U.S. 428 (1992) 28, 32

California Democratic Party v. Jones,
530 U.S. 567 (2000) ..... *passim*

City Council v. Taxpayers for Vincent,
466 U.S. 789 (1984) 48

Clements v. Fashing, 457 U.S. 957 (1982) 31

Clingman v. Beaver, 544 U.S. 581 (2005) ..... *passim*

Cousins v. Wigoda, 419 U.S. 477 44

Democratic Party of U.S. v. Wisconsin ex rel. La Follette,
450 U.S. 107 (1981) 43

Duke v. Cleland, 5 F.3d 1399 (11th Cir. 1993) 41

Duke v. Connell, 790 F. Supp. 50 (D.R.I. 1992) 41

Duke v. Massey, 87 F.3d 1226 (11th Cir. 1996) 41

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) ..... *passim*

FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001) 22, 47

Gray v. Sanders, 372 U.S. 368 (1963) 33, 44

Glover v. United States, 531 U.S. 198 (2001) 48

Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979) 24, 39

Kusper v. Pontikes, 414 U.S. 51 (1973) 21, 23

Lane v. Wilson, 307 U.S. 268 (1939) 21

LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir 1998). 33, 34

Lubin v. Panish, 415 U.S. 709 (1974) 2, 17, 24, 29

Meyer v. Grant, 486 U.S. 414 (1988) 36

Moore v. Ogilvie, 394 U.S. 814 (1969) 29

Munro v. Socialist Workers Party, 479 U.S. 189 (1986)) 29

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 32

Norman v. Reed, 502 U.S. 279 (1992) 27

Randall v. Sorrell, 126 S. Ct. 2479 (2006) 28, 49

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 19, 26, 35, 40

Republican Party of Virginia v. Morse,
517 U.S. 186 (1996) 37, 42

Ripon Society, Inc. v. National Republican Party,
525 F.2d 567 (D.C. Cir. 1975) 33, 34

Riddell v. National Democratic Party,
508 F.2d 770 (5th Cir. 1975) 41, 43

Rodriguez v. Popular Democratic Party,
457 U.S. 1 (1982) 44

Secretary of State v. J.H. Munson Co.,
467 U.S. 947 (1984) 48

Storer v. Brown, 415 U.S. 724 (1974) 21, 27, 28, 42

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986) ..... *passim*

Taylor v. Freedland & Kronz,
503 U.S. 638 (1992) 48

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) 21, 42, 43

United States v. Classic, 313 U.S. 299 (1941) 29

Vieth v. Jubelirer, 541 U.S. 267 (2004) 21

Williams v. Rhodes, 393 U.S. 23 (1968) 17, 29, 38

STATE CONSTITUTIONS AND STATUTES

Ala. Code § 17-13-50(a) 45

Ind. Code Ann. §§ 3-8-4-1 to 7 44

Iowa Code § 43.123 45

Mich. Comp. Laws §§ 168.72-74 45

Michigan Const., art. 5, § 21 45

Michigan Const., art. 8, § 3 45

N.Y. Elec. L. § 6-104(1) 27

N.Y. Elec. L. § 6-104(5) 27

N.Y. Elec. L. § 6-106 ..... 3, 43, 45, 48, 49

N.Y. Elec. L. § 6-110 ..... 27, 48

N.Y. Elec. L. § 6-120 23

N.Y. Elec. L. § 6-120(4) 23

N.Y. Elec. L. § 6-124 ..... *passim*

N.Y. Elec. L. § 6-132(2) 7

N.Y. Elec. L. § 6-134(1) 8

N.Y. Elec. L. § 6-134(3) 7

N.Y. Elec. L. § 6-134(4) 6, 7

N.Y. Elec. L. § 6-136(2) 7

N.Y. Elec. L. § 6-136(2)(a) 7

N.Y. Elec. L. § 6-136(2)(b) 8

N.Y. Elec. L. § 6-136(3) 7

N.Y. Elec. L. § 6-154 8

N.Y. Elec. L. § 6-158(1) 6

N.Y. Elec. L. § 6-158(5) 9

N.Y. Elec. L. § 6-160 27

N.Y. Elec. L. § 6-160(2) 9

N.Y. Jud. L. § 140 5

N.Y. L. 1911, c. 891 45

N.Y. L. 1913, c. 800 46

N.Y. L. 1921, c. 479 47

S.D. Codified Laws §§ 12-5-21 to 22 45

MISCELLANEOUS

Albert S. Bard, "Some Observations on the Primary and Election Laws of the State of New York With Special Reference to the Nomination and Election of Judges," 15 ABCNY Reports No. 169 (March 10, 1914) 46

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STATEMENT

When political party members join together to support a prospective nominee for elective office, they share a crucial moment in the democratic process, a point at which an "appeal to common principles may be translated into concerted action, and hence to political power in the community." *Clingman v. Beaver*, 544 U.S. 581, 590 (2005) (plurality opinion) (internal quotation marks and citations omitted); *see id.* at 599 (O'Connor, J., concurring); *id.* at 612 (Stevens, J., dissenting). New York holds out the promise of such a democratic moment in connection with the nomination of candidates for its supreme court trial bench. But the promise is illusory. As the lower courts found, and as the robust record demonstrates, the State imposes a nominating process that places unconstitutionally severe burdens on the ability of political party members to associate in support of a prospective judicial nominee.

In fact, New York's state-imposed nominating process creates a locked gate, to which those in control of the party machinery hold the only key. The Second Circuit accurately described New York's statutory nominating process as "beset with obstacles," with "restrictive regulations" and "overlapping and severe burdens." PA-17a, 45a, 53a.[1] As Petitioner (and expert witness) Douglas Kellner testified, "the convention system is designed [so] that the political leadership of the party is going to designate the party's candidates." *Id.* at 19a. As both lower courts found, the cumulative impact of New York's statutory nominating procedures is to vest power

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[1] "PA-__" refers to the Appendix to the Petition for Certiorari, which includes the opinions of the Second Circuit (PA-1a-92a) and district court (PA-93a-185a). "JA-__," "HE-__" and "Tr.__," refer to the Joint Appendix, Hearing Exhibits, and Transcript filed in the Second Circuit and in this Court. Relevant New York statutes appear in Appendix A to this Brief.

to select the nominee in the party's leadership, rendering it effectively impossible for rank-and-file party members to influence the choice of their party's nominee.

Petitioners mistakenly dismiss these incontrovertible findings as reflecting only the private choices of political parties. But as shown below, they are the direct and inevitable consequence of New York's statutory scheme. Whatever power a political party acting autonomously may have to invest the party's leadership with autocratic nominating power to the exclusion of rank-and-file members, two mutually reinforcing lines of First Amendment authority forbid New York from imposing such "democratic centralism" on its recognized political parties by statute.

First, this Court has repeatedly held that the state may not require political parties to adopt nominating procedures that abridge the associational rights of party members. *See Clingman*, 544 U.S. 581; *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

Second, this Court has repeatedly held—and the Second Circuit emphasized below—that when the state undertakes to regulate any phase of the electoral process, it may not impose severe burdens on the ability of candidates and voters to gain access to the ballot. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Lubin v. Panish*, 415 U.S. 709 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972).

This case does not call for a policy judgment about the relative merits of an elective or appointive judiciary. New York's system, viewed "in a realistic light," *Anderson*, 460 U.S. at 786 (quoting *Bullock*, 405 U.S. at 143), is neither a legitimate exercise in democracy nor a delegation of appointive power to accountable state officials. Rather, New York vests *de facto* power to appoint supreme court judges in local party bosses, thereby creating a fertile source of corruption,

decreasing confidence in its courts, impeding the search for judicial excellence, and failing to achieve a genuinely representative judiciary. For these reasons, recognizing that New York's system is the worst of all worlds, an impressive array of organizations and individuals with differing perspectives appear as *amici* in support of affirmance.

1. The Operation of New York's Statutory System

New York's statutorily mandated nominating system erects an insurmountable series of obstacles to efforts by political party members to associate in support of a prospective supreme court nominee. The obstacles include: (i) geographically dispersed delegate contests in every one of the numerous Assembly Districts located in each Judicial District; (ii) large numbers of required delegates and alternates (often ranging into the hundreds) who must be recruited four months in advance of the delegate primary; (iii) cumulatively onerous petition signature requirements that must be satisfied within a 37-day window with signatures drawn from a shrinking pool of eligible party members who may sign only one petition; (iv) highly technical signature qualification standards leading to repeated legal challenges; (v) a large number of simultaneous delegate races in which delegates must appear on the ballot without signifying the supreme court candidates they support; and (vi) a mere two-week period between the delegate election and the nominating convention.

The district court found that all of these obstacles combine to create a burden on association so severe that "with very few exceptions, district leaders and county leaders select the delegates and alternate delegates, who, without consultation or deliberation, rubber stamp the county leaders' choices (or 'package' of choices) for Supreme Court Justice." PA-114a. Accordingly, the lower courts issued a preliminary injunction invalidating New York Election Law §§ 6-106 and 6-124.

The trial court made its factual findings after a four-week evidentiary hearing involving testimony from two dozen witnesses and the compilation of a 10,000-page record.[2] The district court concluded that the evidence "established overwhelmingly" that "local major party leaders—*not the voters or the delegates* to the judicial nominating conventions control who becomes a Supreme Court Justice and when." *Id.* at 95a, 136a (emphasis supplied). The Second Circuit agreed that the "evidence showed that a network of restrictive regulations effectively *excludes* qualified candidates and voters from participating in the [delegate] election and subsequent convention." *Id.* at 53a (emphasis in original).

Evidence from across the entire State supported these findings. For example, the lower courts relied on a report issued by the New York State Commission to Promote Public Confidence in Judicial Elections appointed by New York's Chief Judge (the "Feerick Commission"), which included ten sitting or former New York judges. The Feerick Commission found that: "'The uncontested evidence before the Commission is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders.'" *Id.* at 29a. The Second Circuit highlighted the impressive unanimity among those who had studied the nomination system:

> The Commission is hardly the only entity to reach this conclusion—it merely is the latest. Since 1944, New York's judicial nominating system has been described as exclusionary and boss-dominated; reports and newspaper editorials from that time for-

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[2] Only one group of Petitioners even acknowledges the record, and that group's description of the facts is contrary to the findings of the two lower courts. *Compare, e.g.*, Br. of N.Y. County Dem. Comm. *et al.* ("County Br.") at 28 n.14 *with* PA-68a-69a, 114a-15a, 122a-25a.

> ward have decried an electoral practice "that mocks choice," and criticized a system in which "voters can never know the candidates and have to accept party slates," while the "real choice is...left to political bosses...who control nominations." *Id.*

Considering evidence from every part of the State, the district court found that county party leaders (rather than voters or the delegates) control the nomination process across the State, including, for example, in the Judicial Districts that lie: just to the north of New York City, *id.* at 148a; around Schenectedy, *id.* at 143a-44a; around Albany, *id.* at 143a; around Rochester and Buffalo, *id.* at 146a-47a; and within New York City. In Manhattan, "[n]o one can get elected Supreme Court Justice in the First Department without [the county leader's] support." *Id.* at 135a, 65a-66a. In the Bronx, party officials disclosed the names of the judicial nominees "before the delegates—who purportedly select the nominees—were even elected." *Id.* at 19a. And in Brooklyn, "[f]rom the 1960s...through the time of the evidentiary hearing in this case...the county leader in Kings County has selected the Supreme Court Justices in the Second District." *Id.* at 136a.

For decades and all across the State, in both major parties, the same thing has always occurred. The reason is structural, not political. The statutory mechanism by which each party in each Judicial District *must* select convention delegates guarantees that local party leaders control the delegate-selection process and, thus, the nomination.

a. The Delegate-Selection Phase

(i) Structural Dispersion of Races. Although supreme court candidates run at large within one of New York's twelve Judicial Districts, N.Y. Jud. L. § 140, delegates to the nominating convention are *not* elected at large. Rather, New York requires that prospective delegates run "from each" of the (much smaller) Assembly Districts

("ADs") located within each Judicial District. N.Y. Elec. L. § 6-124; *see* PA-86a-92a (map showing overlay of 150 ADs on Judicial Districts). Moreover, the district court found that, in order to associate effectively in support of a prospective nominee, rank-and-file members must run slates of delegates in most or all of the ADs within a Judicial District. *Id.* at 11a, 107a-08a. Success in a single delegate race merely permits the winner to act as "a gadfly at a convention otherwise populated by delegates placed there by the party organization." *Id.* at 112a-13a.

As the district court explained, this geographical distribution requirement "contributes significantly to the heavy burden it places on those who seek major party nominations for Supreme Court Justice without the support of the party's district leaders and county leaders. Such challenger candidates face the prospect of as many [sets of] delegate races as there are ADs in the judicial district—at least nine and as many as 24." *Id.* at 104a. Further, the sheer number of delegates (determined by the parties pursuant to a formula imposed by law) must be burdensomely high in order for the parties to comply with the statutory mandate that the number of delegates in each AD be "substantially in accordance with the ratio" between (a) "the number of votes cast for the party candidate for the office of governor" in the AD at the last election and (b) "the total [statewide] vote cast at such election for such candidate." N.Y. Elec. L. § 6-124. In 2004, for example, the combined number of delegate and alternate positions in the twelve Judicial Districts ranged from a low of 48 to a high of 370, with a median of 187. *See* PA-105a-06a.

(ii) Recruiting Delegates. The entire slate of candidates for delegates and alternates in each AD must be identified and recruited nearly four months before the primary. *See* N.Y. Elec. L. §§ 6-134(4), 6-158(1). The slates must contain numerous registered party members for each AD, and, as noted, delegates are elected from each of the Judicial District's many ADs. PA-107a-08a. As one judge who un-

successfully sought the Republican party nomination observed, this large number of people had to be willing "to contribute significant energy, time, and money to run as delegates and win a campaign against the county Republican Party's leaders' candidates for the elusive satisfaction, if successful, of voting for me at a single judicial convention, and thereby jeopardizing their political future." JA-230 ¶ 14; *see* Tr. 389-90. Another judicial candidate observed that the nature of the job mystifies most party members. *See* JA-501 ¶ 11.

By contrast, as the lower courts found, local party leaders easily tap "reliable" party loyalists to qualify as delegates, who will "adhere to the instructions of each county chairman." PA at 21a; *see id.* at 109a-10a; *see generally Amicus* Br. of John R. Dunne; *id.* at 18. Petitioner Kellner admitted that local politicians select the judicial delegates "at a meeting where I'm reminded of the old song, politics and poker from Fiorello, where they're sitting around the table and say who do we run?" Tr. 1624.

(iii) Collecting Signatures. Each slate of delegates in each AD or part of an AD must file its *own* 500-plus signature petition. N.Y. Elec. Law §§ 6-136(2)(a), (3), 6-132(2). Moreover, delegate petitions may be signed only by registered party members actually residing in the particular AD. *Id.* In contrast, candidates for all other elected offices in the State—including the many other elected *judicial* offices—obtain signatures from party members residing anywhere in the political subdivision that the officer will serve. *Id.*

Each party member may sign only one petition. *Id.* § 6-134(3). Thus, "the number of available signatories shrinks each time a party member signs a designating petition." PA-12a. Further, petition circulators have a 37-day "window" to gather petitions. N.Y. Elec. L. § 6-134(4). The lower courts found that this "brief period" renders gathering so many sig-

natures in each AD a "difficult task." *See* PA-12a, 14a, 62a, 108a.

Rank-and-file members seeking to support delegates thus face a cumulative set of obstacles in gathering signatures. The number of signatures required to run a slate of delegates across a Judicial District is several times larger than the number required to qualify for the primary ballot for other judicial offices covering the same territory. For example, in Brooklyn (Kings County), supporters of candidates for other countywide judicial offices, such as civil court judge, must gather 4,000 valid signatures from anywhere in the county. N.Y. Elec. L. § 6-136(2)(b). In contrast, supporters of a candidate for supreme court in the Second Judicial District (covering Brooklyn and Staten Island) must amass a total of 12,000 valid signatures drawn equally from the 24 ADs in the Judicial District. PA-107a-09a. As the district court found, "these features of New York's electoral system render any effort by a challenger candidate to field slates of supportive delegates and alternates virtually impossible. Indeed, it is considerably easier for an aspiring Supreme Court Justice to petition herself onto the ballot for the office of Mayor of New York City." *Id.* at 108a-09a.

The lower courts found that party leaders "can easily mobilize the resources necessary to conduct the petition drives throughout the judicial districts because they are collecting signatures in all of those ADs anyway, for a variety of other party and public offices." *Id.* at 109a; *see id.* at 16a-17a. Indeed, New York permits petitions to list the leaders' hand-picked candidates for judicial convention delegate along with candidates supported for high-profile offices such as governor, senator, or mayor. N.Y. Elec. L. § 6-134(1).

(iv) Defending Petitions. As the lower courts explained, in New York generally, "petition signatures are routinely and successfully challenged" on numerous technical grounds. PA-13a, 108a; *see* N.Y. Elec. L. § 6-154 (setting

forth process for objecting to petition signatures). History teaches, and the lower courts found, that to withstand such legal attacks, successful petitions must contain two to three times the legal minimum of signatures. PA-13a, 108a. This magnifies the already-overwhelming signature-gathering burden substantially. For example, the lower courts found that supporters of a supreme court candidate in the Second Judicial District "would need to gather 24,000 to 36,000 signatures drawn equally from the 24 ADs in the district." *Id.* at 108a.

(v) Electing Delegates. Even if it were possible for rank-and-file party members to assemble a slate of delegates and to place them on the ballot, New York makes it severely burdensome to wage an election campaign for delegate in support of a particular judicial candidate. Petitioners agree that, unlike delegates to more familiar nominating conventions, the prospective judicial delegates "cannot signify on the primary ballot an allegiance to a specific [supreme court] candidate." *Id.* at 107a. "[T]he rules," testified Petitioner Kellner, "are basically set up to discourage that." Tr. 1568. Because the names of prospective delegates are rarely well known, party members would be unable to distinguish one slate from another without expensive educational campaigns in each AD informing the party members "which delegates are pledged to [the candidate] in that specific locale." *Id.* at 13a. Not surprisingly, as a result of these cumulative statutory barriers to electing slates of delegates, challenges to those slates selected by the county party leaders almost never occur. Instead, the party leaders' chosen slates are deemed "elected" without ever appearing on a ballot. *Id* at 18a, 130a; *see* N.Y. Elec. L. § 6-160(2).

(vi) Post-Election Period. The nominating convention must take place two weeks after the election of delegates. N.Y. Elec. L. § 6-158(5). The lower courts found that two weeks is an "unrealistically brief" time for supreme court candidates or their supporters to interact effectively with the

delegates. PA-18a, 116a. Indeed, such a short statutory timeframe makes clear that the Legislature did not envision that any meaningful deliberation by delegates would occur.

Moreover, delegates themselves have no incentive to deliberate and every incentive to obey the county party leader who hand-picked them. As the lower courts found, delegates simply "do not exercise their own judgment when deciding which candidate to support." *Id.* at 19a; *see id.* at 114a. As one of Petitioners' witnesses admitted, delegates avoid nomination contests because that would "force the delegates to make a choice between supporting a candidate that they might—that they might want to support and offending the county leader." Tr. 1295.

b. The Nominating Conventions

Given the lock-up of delegates caused by the statutory delegate selection process, the lower courts found that judicial nominating conventions are *pro forma* affairs at which delegates "rubber stamp" decisions made earlier by the party leadership. Historically, more than 96% of nominations have been uncontested at the convention. PA-22a. The lower courts credited evidence of the compressed time devoted to the conventions, which often take twenty minutes or less, *see id.* at 126a-29a, and the high absentee rates for judicial delegates, which range from 25% to 69%, *id.* at 23a, 104a n.8. "The extremely high absentee rate reflects, among other things, the fact that delegates to the conventions know their votes do not really matter." *Id.* at 125a.

Not surprisingly, delegates engage in no debate, and do not challenge the party leader's choice of nominees. *See, e.g., id.* at 18a-22a, 114a, 125a.[3] This finding rested on

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[3] Petitioners argued below that the convention provides an opportunity for "an elected body of informed delegates to consult, deliberate and choose Supreme Court nominees who best reflect the interests and values

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overwhelming evidence, including the expert testimony of Petitioner Kellner, who "conceded that at least in some judicial districts, the 'leadership of the party...hold[s] a meeting before the convention' to 'work things out,' and then makes nomination 'recommendations' to the delegates. Asked whether those 'recommendations' were 'always followed,' Kellner replied, 'Generally, yes.'" *Id.* at 21a. Kellner admitted that most nominating conventions operate in the manner of a proverbial "smoke-filled room." *Id.* at 149a n.36 (citing Tr. 1630-31). He also testified that (since the time he became privy to the party leader's decisions thirty years ago) "I have known what the result would be before every roll call that has happened." Tr. 1579.

Political scientist Bruce Cain, testifying for plaintiffs, analyzed the conventions across the entire State, searching for any examples of supreme court candidates successfully challenging the leadership's candidates at the convention. He found none. The district court credited Dr. Cain's analysis, finding "no evidence of a single successful challenge to candidates backed by the party leaders." PA-131a-32a.

c. General Elections

The supreme court nomination process is particularly important because the general election for supreme court is virtually always "little more than ceremony." *Id.* at 23a. Democrats always prevail in such elections within New York City, while Republican nominees almost always prevail elsewhere in the State. *Id.* at 129a. While the *pro forma* nature of supreme court elections does not impugn their integrity—local dominance by a political party usually reflects free electoral choice—it renders it particularly important to

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of the delegates' constituents.'" *Id.* at 113a-14a. The district court rejected this contention: "It does not describe how the system in fact works." *Id.* The Second Circuit agreed. *Id.* at 22a-23a, 64a-70a.

safeguard the associational rights of persons seeking to participate in the nominating process, because nomination is so often tantamount to election.

Moreover, lack of electoral competition is not limited to so-called one-party districts. "In districts that are not dominated by a single party, the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." *Id.* at 130a. In some districts, more than half the candidates are cross-endorsed by the two major parties, and 62% of the entire State's voters in supreme court general elections have only one choice among major-party candidates. *Id.* at 23a, 130 & n.26.

d. Judge Margarita López Torres—An Example of the System in Action

As the district court observed, the experience of Judge López Torres "reveals most of the flaws in the process by which Supreme Court Justices are selected in New York." *Id.* at 136a. Judge López Torres was elected to Kings County civil court in 1992. She was "off to a great start in her judicial career." *Id.* at 137a. Shortly after she was elected, however, she "was told by [Clarence] Norman, the county leader, and Vito Lopez, her district leader, to hire a particular young attorney as her court attorney," the state-court analog to a federal judge's law clerk. As the district court explained, "the party leaders...felt entitled to place employees in her chambers." *Id.* at 137a-38a.

Judge López Torres interviewed the attorney, checked his references, but did not hire him because she concluded that he was unqualified and would spend his days attending to political work rather than to legal research and writing. Norman and Lopez were "extremely upset." They demanded that she fire her well-qualified law clerk and instead hire their (unqualified) candidate. She declined. "Some day, Norman warned her, she 'would want to become a Supreme Court Justice and...the party leaders would not forget this.' He told

her that 'without the "County's" support, her Supreme Court nomination 'will not happen.'" *Id.* at 25a; *see id.* at 138a.

Some years later, District Leader Lopez offered Judge López Torres "a chance to redeem herself: if she hired his daughter as her law secretary, he would secure her nomination as the Democratic Party's candidate for Supreme Court Justice." Again, Judge López Torres declined, "refusing to fire the qualified attorney she had initially hired to the position." *Id.* at 139a, 24a-25a.

Judge López Torres eventually did seek the Democratic supreme court nomination starting in 1997. But Norman told her that her earlier independence had been "a serious breach of protocol." *Id.* at 26a. Nonetheless, several elected officials asked if she would be willing to be considered for nomination. She agreed. JA-175. Norman demanded that she withdraw in writing, saying that her continued candidacy was an "affront" and that actually seeking the nomination in the convention "was not the way it works." PA-26a. The convention delegates fell into line with Norman: not one even proposed her nomination. *Id.*

In 2002, Judge López Torres sought reelection as a civil court judge (nominated in a primary election) and also sought the nomination for supreme court. She asked Norman to refer her name to a party "screening panel," which recommends qualified candidates for nomination to supreme court. (The panel considered *only* those candidates that Norman referred.) Norman refused, solely because she had been "disloyal." *Id.* at 27a, 140a.

The Kings County Democratic Party leaders then turned on Judge López Torres, supporting a candidate against her in the 2002 primary election for her civil court position. She prevailed in the civil court primary, and, in the 2002 general election, received more votes on the Democratic line in Brooklyn—over 200,000—than any of the Democratic candidates for supreme court.

But "indisputable qualifications for the job and immense popularity among the candidate's fellow party members are neither necessary nor sufficient to get the party's nomination" for supreme court justice. *Id.* at 131a. In contrast to the primary for civil court, County Leader Norman controlled the 2002 supreme court nominating convention. According to Petitioners' own witness (who had chaired the convention) Norman directed delegates to nominate "a horrible choice," who would be "bad for the bench." *Id.* at 114a-15a. Judge López Torres—the party's most popular judicial candidate ever in the Borough of Brooklyn—received only 25 votes out of the 137 possible delegates. JA-1582; HE-2268, 5903-04.

In 2003, Judge López Torres tried again. Norman continued to oppose her, saying she did not have sufficient "support" to gain the nomination. But, according to the district court,

> Since she had been the leading vote-getter among elected judges in Brooklyn just six months earlier, Norman was not referring to support in the electorate. Rather, he was referring to the only support that matters when it comes to Supreme Court Justice candidates in the Second District—his own and that of the district leaders. PA-142a.

Judge López Torres tried to appeal to the delegates directly. But her "efforts to identify and lobby the delegates...were frustrated by both the timing of the relevant events and the antipathy of the party leadership." *Id.* The leadership refused to tell her where or when the convention would be held, or who the delegates were. *Id.* at 121a.

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As the Second Circuit stated, "[y]ears of careful study by a number of groups whose reports were in evidence established that López Torres' experience was no anomalous po-

litical mugging." *Id.* at 29a. According to New York's Chief Judge,

> One thing now is perfectly clear: that given the extensive findings of the Feerick Commission and the extensive findings of the United States District Court, we are not dealing solely with a "Brooklyn problem," or a "New York City problem," as I have heard some say. The issues that have been identified are pervasive, both systemically and geographically. Judith S. Kaye, *State of the Judiciary* at 4 (2006).

2. Proceedings Below

On Plaintiffs' motion for a preliminary injunction, the district court issued a thorough decision, making extensive findings of fact and faithfully applying this Court's precedents protecting access to the ballot. The court concluded that Plaintiffs had "made a compelling showing that the New York system is designed to freeze the political status quo," PA-183a, had a substantial likelihood of success on the merits, *id.* at 185a, and met the other requirements for a preliminary injunction.

A unanimous panel of the Second Circuit affirmed, holding that New York's statutory scheme unconstitutionally denied challenger candidates and voters "a realistic opportunity to participate in the nominating process." *Id.* at 41a. The court had no doubt that the State's burdens on associational rights are "severe": the New York scheme "does not merely deprive a candidate of a realistic chance to prevail; rather, through the use of overlapping and severe burdens, it deprives a candidate of access altogether." *Id.* at 45a. "[C]andidates lacking party leaders' support and the voters who wish to associate with them are practically, if not formally, excluded from the nomination process." *Id.* The court assessed these burdens in light of the extensive record developed below, including statistical, documentary, and testimonial evidence from two dozen witnesses, concluding that

the statutes blocked intra-party collective action by anyone without "either great wealth or a massive preexisting political apparatus." *Id.* at 59a.

The Second Circuit then considered and rejected as insufficient each of the State's proffered justifications for the burdens imposed by its election system, applying strict scrutiny. *Id.* at 70a-76a. Of most relevance here—given Petitioners' assault on the lower court's reasoning—the Second Circuit considered and rejected Petitioners' argument that the district court accorded "little respect" to the "constitutionally protected right of association of political parties and their members." (Br. of Appellants at 68-69.) In fact, the Second Circuit—focusing on cases advanced by Petitioners—distinguished New York's statutory micromanagement of the nominating process in this case from the national presidential conventions, which are governed by autonomous decisions by the parties and are, therefore, protected by "the party's right to govern its own internal affairs." PA-51a.

SUMMARY OF ARGUMENT

The principal issue raised by this case is whether New York State may mandate a nominating process that imposes insuperable burdens on the ability of members of a recognized political party to participate in the choice of their party's nominees. Both lower courts found that at each of the two possible moments for collective action—the election of delegates and the convention itself—New York's statutes preclude effective political mobilization except by those in control of the party machinery. Such a state-imposed burden on political association by rank-and-file party members violates the First Amendment.

1. The First Amendment protects members of political parties against state abridgement of "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters...to cast their votes effectively. Both of

these rights, of course, rank among our most precious freedoms.'" *Anderson*, 460 U.S. at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

These mutually reinforcing rights have given rise to two lines of cases germane here. The State laws at issue are invalid under both.

a. The First Amendment protects a political party's nomination process from statutes that dilute or abridge the ability of party members to associate with one another in selecting the nominee. *E.g.*, *Jones*, 530 U.S. 567; *Eu*, 489 U.S. 214. This Court has held that party members' First Amendment associational rights are unconstitutionally diluted when the state mandates the inclusion of non-members in the process of selecting a party's nominee. *Jones*, 530 U.S. 567. It has also held that party members' associational rights are unconstitutionally abridged when the state forbids party leaders from communicating a preference for a given candidate for the party's nomination. *Eu*, 489 U.S. 214. And it has held that party members' associational rights are unconstitutionally truncated when the state forbids the inclusion of independent voters in the process of selecting party nominees *Tashjian*, 479 U.S. 208. If the First Amendment forbids the state from diluting party members' associational rights by including outsiders as in *Jones*, abridging them by silencing party leaders as in *Eu*, or truncating them by forbidding inclusion of independents as in *Tashjian*, then surely New York may not completely *eliminate* the members' ability to influence the party's choice of nominee by the onerous statutory procedures mandated in this case.

b. The First Amendment also forbids a state from imposing unduly severe burdens on party members' and candidates' access to the ballot at both the nomination phase and the general election. *See Bullock*, 405 U.S. at 146-47; *Lubin*, 415 U.S. at 716. Where, as here, the state burdens eligible candidates' access to a state-mandated element of the elec-

tion, including the nomination process, the state "burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson*, 460 U.S. at 787-88.

c. Under both lines of First Amendment cases, in order to satisfy strict scrutiny, New York must show that its extremely burdensome method of selecting nominees is a narrowly tailored means of advancing a compelling state interest.

2. Petitioners place great weight on this country's historic use of conventions and this Court's statement in *American Party of Texas v. White*, 415 U.S. 767, 781 (1974), that conventions are a permissible forum for resolving intra-party competition. But the question in this case is not whether nominating conventions are *always* constitutional or *never* constitutional. Any state-mandated nominating convention must be evaluated on its own merits. The sole question before this Court is whether the statutes mandating this *particular* convention system, viewed in a realistic light, impose severe burdens on the associational and voting rights of party members and, if so, whether such burdens are narrowly tailored to serve a compelling state interest.

3. New York may not avoid strict scrutiny of its statutory scheme by pretending that this case involves protection of the autonomy of political parties. The statutorily mandated nomination process at issue in this case is imposed on all recognized political parties in New York, whether they like it or not. This case simply does not raise the question of the extent to which the Constitution limits—or protects—truly autonomous choices made by political parties concerning their nomination processes.

4. Petitioners have failed to demonstrate that the severe burdens on the associational and voting rights of party members imposed by New York are narrowly tailored to

serve compelling state interests. The State argues that the statutory scheme relieves candidates for judicial office of the burden of educating party members during the nomination process. In the teeth of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the State contends that it has a compelling interest in *preventing* prospective candidates for judicial office from communicating with party members in connection with delegate selection. But the State has no legitimate interest in foreclosing speech between candidates and prospective voters during any stage of the electoral process, including the nomination phase. The State's "greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance." *Id.* at 788. If New York wants party members entirely out of the business of nominating judges, it may adopt an appointive system.

The State's other proffered interests—protection of judicial independence and advancement of judicial diversity—fare no better. Given the statutes' notoriously deleterious effect on both judicial independence and judicial diversity, New York's system can hardly be defended as a narrowly tailored means of advancing either interest.

Certain Petitioners offer additional "State interests" not suggested by the State itself. They claim that the statutes promote strong party leadership, enhance parties' chances of winning, and help avoid factionalism. But the State has no legitimate interest in entrenching party leaders and privileging their choice of nominees at the nomination stage by fencing out the parties' own members. *See Jones*, 530 U.S. at 584; *Eu*, 489 U.S. at 227-28. Indeed, this case is the obverse of *Eu*. Just as the State may not silence party leaders, it may not silence the rank and file. Similarly, the State lacks a legitimate interest in seeking to alter the electoral chances of political parties. Finally, excluding party members from a fair opportunity to resolve intra-party disputes is hardly a

narrowly tailored means of avoiding factionalism. Rather, it is a recipe for party-splitting.

5. Petitioners warn that a parade of horribles, including a ban on nominating conventions, will befall political parties if the Second Circuit's decision is upheld. But this case does not concern the ability of political parties to act autonomously, and will not affect the overwhelming majority of nominating conventions. Most obviously, the national party presidential nominating conventions are not implicated by this case: they do not operate pursuant to a government-imposed structure, but rather in accordance with rules set by the parties autonomously. Nor will affirmance affect the vast bulk of statutorily regulated conventions cited by Petitioners, which arise in different circumstances and which do not severely burden the associational rights of party members.

ARGUMENT

I. NEW YORK'S STATUTORY SCHEME IMPOSES SEVERE BURDENS ON THE ASSOCIATIONAL AND VOTING RIGHTS OF PARTY MEMBERS

The nomination process is "the 'crucial juncture' at which party members traditionally find their collective voice and select their spokesman." *Jones*, 530 U.S. at 586 (citations omitted). Accordingly, the First Amendment grants special protection to "the process by which a political party 'selects a standard bearer who best represents the party's ideologies and preferences.'" *Id.* at 575 (quoting *Eu*, 409 U.S. at 224).

This Court evaluates state-imposed burdens on the freedom to associate in support of candidates during all phases of the electoral process—including the nomination phase—by examining such burdens "in a realistic light" to determine their "impact on voters." *Anderson*, 460 U.S. at 786 (quoting *Bullock*, 405 U.S. at 143); *see Clingman*, 544 U.S. at 607-08 (O'Connor, J., concurring); *Tashjian*, 479 U.S. at 234

(Scalia, J., dissenting); *Storer v. Brown*, 415 U.S. 724, 740 (1974); *cf. Vieth v. Jubelirer*, 541 U.S. 267, 315-16 (2004) (Kennedy, J., concurring); *Lane v. Wilson*, 307 U.S. 268, 275-76 (1939). Such examination here leaves no doubt that New York's statutory scheme imposes extremely severe burdens on party members' rights to associate with each other and with the candidates of their choice. As the Second Circuit observed, challengers and their supporters have no "right to win." PA-45a. But candidates and their supporters within a party do have a right to be free from a state-mandated process guaranteeing that they will lose.

A. The Statutes Severely Burden Party Members' Rights to Associate with One Another

"A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice" in the nomination process. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). Sections 6-106 and 6-124 are admittedly designed to prevent the party members from performing this "basic function." *Id.*

The associational rights of rank-and-file members are of independent significance and warrant constitutional protection, separate and apart from the interests of party leaders. Indeed, leaders' views often "diverge[] significantly from the views of the Party's rank and file." *Tashjian*, 479 U.S. at 236 (Scalia, J., dissenting). Thus, in *Eu*, this Court rejected California's argument that its restriction on primary campaign endorsements was constitutional because the parties had "consented to it": "[T]he State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members. It is wholly undemonstrated that the members authorized the parties to consent to infringements of members' rights." *Eu*, 489 U.S. at 225 n.15. And in *Jones*, this Court reiterated that: "The ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the

party leadership, but do not want the party's choice decided by outsiders." *Jones*, 530 U.S. at 581; *see also FEC v. Colo. Republican Campaign Comm.*, 533 U.S. 431, 448 n.10 (2001) ("We have repeatedly held that political parties and other associations derive rights from their members.").

In associating with one another for the purposes of advocating for their preferred nominee, party members' associational rights reach their zenith. *See Tashjian*, 479 U.S. at 216. The "associational rights at stake are much stronger" when "party members do not seek to associate with nonparty members, but only with one another...." *Eu*, 489 U.S. at 230-31 (footnote omitted). "[A] State may enact laws to 'prevent the disruption of the political parties from without' but not...laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" *Id.* at 227 (quoting *Tashjian*, 479 U.S. at 224).

Here, by statute, the State "prevent[s]...parties from taking internal steps affecting their own process for the selection of candidates," *id.*, by effectively requiring political parties to fence out their rank-and-file members, leaving them with no voice in the parties' nomination processes. As a result, New York provides candidates with the imprimatur of a party nomination, while depriving the rank and file of a voice in selecting those who ostensibly speak in their name. Thus, New York's statutes are unconstitutional for reasons akin to those invoked by this Court in *Jones*, where the state mandated a nomination process that created a risk that rank-and-file members would be forced "to give their official designation to a candidate who is not preferred by a majority or even plurality of party members." *Jones*, 530 U.S. at 579 (quotations omitted). As in *Jones*, "[t]he true purpose of this law... is to force a political party to accept a candidate it may not want." *Id.* at 587 (Kennedy, J., concurring).

Petitioner Board of Elections concedes that "the First Amendment does not permit a State to favor the speech ac-

tivities of one class of candidates over another." BOE Br. 28. But, just as it runs afoul of the First Amendment to "silence party leaders," *id.*, it is equally impermissible for the State to adopt a structure that operates to silence the rank and file.

Even more dramatically, New York vests local party leaders with power, when it serves their parochial interests, to cross-endorse candidates of rival political parties without the members' participation or consent. *See Jones*, 530 U.S. at 579; *compare Clingman*, 544 U.S. at 589 (plurality) (describing attenuated interest of party members in associating with members of other parties at nomination stage).[4] To take one example, the statutorily rigged Democratic Party convention in the Second Judicial District nominated a member of the Republican Party who had been found unqualified by the Democratic Party's own "screening panel." Tr. 1742-43. As this Court has held, the party's rank-and-file members suffer a significant First Amendment harm when they are thus "saddled with an unwanted, and possibly antithetical, nominee." *Jones*, 530 U.S. at 579.[5]

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[4] New York law ordinarily bars non-members of a party from obtaining a party's nomination without the consent of the party's committee for the relevant jurisdiction. N.Y. Elec. L. § 6-120. But the statute makes an exception for judicial nominations, *i.e.*, no such consent is needed. *Id.* § 6-120(4).

[5] Petitioners are wrong to suggest that the "option" of disaffiliating from the party will alleviate the burdens New York imposes. In order to avoid associating with the antithetical judicial nominee, a rank-and-file member would have to leave the party and thus sacrifice the ability to participate in its primary elections for all other offices. *See Kusper*, 414 U.S. at 57 (invalidating state registration law that forced the voter "to forgo participation in any primary elections occurring within the statutory 23-month hiatus"). Petitioners also err in suggesting that disaffected party members may simply put in new leadership. First, county leaders are not elected by party members. Second, the statutes ensure that rank-and-file party members will be fenced out of their own party's nomination process regardless of who is elected party leader. Finally, as the district court ob-

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Because the Court is here confronted with a statutory scheme imposed upon all parties, the case presents no occasion to decide whether a political party could, acting on its own without the command of state law, invest nominating authority in "the party's executive committee in a smoke-filled room." *Tashjian*, 479 U.S. at 236 (Scalia, J., dissenting). In effect, New York has mandated "the smoke-filled room" as the method for all parties to nominate candidates for the supreme court bench. Usually, states regulate elections for precisely the opposite purpose: "*to protect* the general party membership against this sort of minority control." *Id.* (citations omitted) (emphasis added). That the Constitution permits. But it is far different for a state to require that every party must use a procedure that operates to deny rank-and-file members any meaningful role in the nomination process. The First Amendment simply does not permit such extensive government interference with the associational rights of party members.

B. The Statutes Severely Burden Party Members' Rights to Associate with Candidates for Their Party's Nomination

"[T]he rights of voters and the rights of candidates do not lend themselves to neat separation." *Bullock*, 405 U.S. at 143. When statutes deprive candidates of "the availability of political opportunity," they directly impact the voters, who "can assert their preferences only through candidates or parties or both." *Lubin*, 415 U.S. at 716; *see Ill. Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences"). The

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served, "voters cannot be expected to provide any check on party leaders' judicial selections by voting those leaders out of office for exercising poorly a discretion with which they are not vested." PA-183a.

record in this case leaves no doubt that the statutory burdens imposed on candidates for their parties' nomination are severe.

The findings below "establish that candidates lacking party leaders' support and the voters who wish to associate with them are practically, if not formally, excluded from the nomination process." PA-45a. The statutory nominating process "does not merely deprive a candidate of a realistic chance to prevail; rather, through the use of overlapping and severe burdens, it deprives a candidate of access altogether. The exclusion of candidates, in turn, severely and unnecessarily 'limit[s] the field of candidates from which voters might choose....'" *Id.* at 45a-46a (quoting *Anderson*, 460 U.S. at 786). The statute thus burdens voters and candidates alike—it locks both out of the crucial moment of intra-party political competition.

Petitioners concede that the State *wishes* to block access by candidates to voters during the nomination stage.[6] Recognizing that the severe statutory burdens render it impossible for challenger candidates to assemble and run a slate of delegates, Petitioners criticize the lower courts for even considering the possibility of candidates seeking to campaign for the nomination by running slates of delegates or otherwise.[7]

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[6] The office, they tell us, should "seek the man [*sic*]." County Br. at 2; AG Br. at 11; *see* BOE Br. 32 ("Section 6-124 does not envision the judicial candidate's participation at all."). In reality, however, candidates for supreme court often "campaign" by making cash contributions to political committees controlled by the county leaders. PA-136a.

[7] In fact, one Petitioner, the New York State Republican Committee, tried the case on the theory that the statutes were constitutional *because* candidates were able to run their own slates. Its counsel explained: "There is some difference of opinion at defense table in terms of the ability of John Doe, citizen, to run for a judge of the Supreme Court. I think the statute is very clear. This statute permits any candidate for Supreme Court to go and identify and run their own candidates for judicial convention.... You may run your own delegates." Tr. 2434 (Muir Summation).

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Candidates for a judicial nomination, argue Petitioners, may be prevented by the State from engaging in such undignified political behavior. But, as this Court recognized in *Republican Party of Minnesota*, this cannot be the way a true election system works. If New York believes that such a fundamental exercise in democracy adversely affects the judiciary, the answer is to opt for an appointive bench. The one option not open to New York is to pretend that its supreme court judges are freely elected, while rigging the process to vest *de facto* appointive power in one or two county party leaders.

Moreover, *voters* who belong to political parties have a constitutional right to join together with like-minded members of their parties in order to influence the selection of the parties' nominees. Petitioners argue that such political behavior is possible under New York's system because a single party member may run for delegate. But Petitioners' myopic focus on the burdens faced by a *single* delegate candidate (running as a lone gadfly) is misplaced. As the lower courts found, a single delegate acting alone cannot influence the actual choice of a nominee. Given the statutory system, only slates of delegates elected from each of many ADs despite insuperable burdens could act as a counter-weight to the hand-picked delegate slates chosen by the county party leader. As the lower courts found, this never happens. *See* PA-53a.

Thus, New York's statutory scheme erects barriers ensuring that "potential office seekers...are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter

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The Republican State Committee's position in the lower courts undercuts Petitioners' and the Republican National Committee's contention in this Court that "[j]udicial candidates have no contemplated role in this delegate-selection stage of the process," and that the lower courts erred "by overlooking this fact." RNC Br. 3.

how broad or enthusiastic their popular support." *Bullock*, 405 U.S. at 143. At the same time, the statutory scheme gives the county party leaders, who are the only ones capable of assembling and electing slates of delegates, "the power to place on the ballot their own names or the names of persons they favor." *Id.* at 144.

New York is the only State that uses such a restrictive system to nominate judges. PA-97a. Even within New York, the supreme court nominating system stands in contrast to that for every other elective office—judicial[8] and non-judicial.[9] This, too, is evidence of burden. *See, e.g., Norman v. Reed*, 502 U.S. 279, 294 (1992) (burden severe where state "adduced no justification for the disparity"); *Storer*, 415 U.S. at 739 (comparing statute to "most state election codes").

Finally, conditions at the general election highlight the lack of an opportunity for competition at the nomination stage. In most supreme court elections, one of the two major parties is locally dominant, assuring the election of the party's nominee.[10] While local party dominance is not inconsistent with free elections, its presence in this case under-

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[8] The State requires parties to employ primaries to nominate candidates for election to all of the State's many other elected courts, including Surrogates Court, Family Court, County Court, Civil Court, City Court, and District Court. N.Y. Elec. L. § 6-110; *see* PA-98a.

[9] New York's legislators run in direct party primaries. N.Y. Elec. L. § 6-110. Candidates for statewide offices are designated at conventions, with post-convention primaries if a substantial group within the party is dissatisfied with the convention's designee for a particular office. N.Y. Elec. L. §§ 6-104(1), 6-104(5), 6-160.

[10] Notwithstanding the Board of Elections' suggestions to the contrary in this Court, the lower courts' findings were well documented, amply supported by the evidence and admitted below by the Petitioners. *See* Tr. 1601-02 (Petitioner Kellner); PA 129a-30a; JA-254-55 ¶¶ 16-17 (Cain); JA-1602 ¶¶ 209, 211; HE-4717-4908, HE-5261; Tr. 1524-25.

scores the importance of protecting freedom of association at the crucial nomination stage. Since one-party domination of supreme court general election races persists in much of the State, and since the major parties routinely cross-endorse candidates elsewhere, access at the nomination stage is particularly important. *See Bullock*, 405 U.S. at 147; *Burdick v. Takushi*, 504 U.S. 428, 442-45 (1992) (Kennedy, J., dissenting).

No doubt exists that the burdens imposed by New York on candidates for the nomination (and their supporters) are "severe" as that term has been used by this Court. In evaluating whether burdens on candidates (and thus voters) are severe, this Court has considered whether challenger candidates have "only rarely" succeeded in being considered by the voters. *See Storer*, 415 U.S. at 742. The lower courts properly considered the historical record as part of the evidence of the severity of the statutory burdens, showing the extraordinary degree to which the statutes lock out rank-and-file members and their candidates. Here, "to say that challenger candidates for the Supreme Court 'only rarely' succeed...gives euphemism a bad name. It never happens." PA-167a (citation and quotation omitted).[11]

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[11] Similarly, in the campaign contribution context, this Court has analyzed state interference with the opportunity for electoral competition by evaluating whether government regulations "put challengers to a significant disadvantage" and "prevent[] challengers from mounting effective campaigns." *See, e.g., Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (Breyer, J., for a plurality). "[T]he critical question concerns... the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*." *Id.* at 2496 (emphasis in original); *see Buckley v. Valeo*, 424 U.S. 1, 31 & n.33 (1976) (evaluating whether contribution limits evidence "invidious discrimination against challengers as a class," such as where "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge"). New York's state-imposed burden on challengers to candidates anointed by party leaders warrants similar scrutiny.

In the face of this evidence, Petitioners contend that the State's uniform exclusion of challengers at the nomination stage is not of constitutional dimension. County Br. 25-26. But this Court has never suggested that state-mandated burdens on the ability of a party member to associate with other members to seek the party's nomination receive lesser scrutiny than burdens on competition at the general election. To the contrary, this Court's precedents apply the same level of scrutiny to state-imposed burdens at both the nomination stage and at the general election. This Court considered the very argument Petitioners make here and rejected it in *Bullock*: "we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens...imposed by state law." 405 U.S. at 146-47.[12]

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[12] *Bullock* followed earlier cases to the same effect. *See Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) ("All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote."); *United States v. Classic*, 313 U.S. 299, 318 (1941) (where state law makes the primary "an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected.").

The Board argues that a State can require party members "'to channel their expressive activity into a campaign at the [general election] as opposed to the [primary].'" BOE Br. 23 (misquoting *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986)). But *Munro* does not stand for that proposition. It held that a minor party's interests were satisfied by access to voters in a state-wide blanket primary, even though the candidate did not make a sufficient showing at the primary to access the general election ballot. The party made no claim that its members' intra-party associational rights were burdened. Because it was a blanket primary, moreover, the candidate in question had the opportunity to be supported by his own party's members in any event. Finally, the 1% threshold was justified by the state's interest in ensuring that the ballot was not confusingly filled with candidates without sufficient support among voters.

And, in *Lubin*, this Court expressly extended the logic of earlier ballot-access cases to intra-party competition:

> "[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot." This must also mean that the right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot. *Lubin*, 415 U.S. at 716 (quoting *Williams*, 393 U.S. at 31 (1968)).

The Board of Elections argues that *Bullock* and *Lubin* rested solely on the Equal Protection Clause and that there is "no pertinent authority whatsoever" for the "revolutionary conclusion" that members of political parties "have a First Amendment right to associate in the context of a political party's candidate-selection process." BOE Br. 16-17. But the Board confuses judicial review of a party's autonomous decisions with judicial review of statutes mandating a particular nominating procedure. This Court has consistently held that *all* state-imposed severe burdens on ballot access and associational rights at any stage of the electoral process must survive strict scrutiny. As recently as 2005, this Court relied on *Bullock* for the proposition that a severe state-imposed burden "between voter and party" at the nomination stage requires strict scrutiny under the First Amendment. *Clingman*, 544 U.S. at 593; *accord Jones*, 530 U.S. at 582. In *Anderson*, moreover, this Court made explicit that the analysis developed in *Bullock*, *Lubin*, and other cases derives from *both* the First and the Fourteenth Amendment. *Anderson*, 460 U.S. at 786-87 & n.7. Even in *American Party*, the Court used heightened scrutiny to analyze severe burdens on

the "right to association" at nominating conventions. *Am. Party*, 416 U.S. at 780.[13]

Petitioners also contend that the burdens on candidates are not severe because the statutes "grant a reasonably diligent candidate the opportunity to access the nominating convention, *i.e.*, having a chance to put his or her name up for consideration by the delegates." County Br. 27. That contention, however, is contradicted by the record. As the courts below found, "a candidate who lacks the support of her party's leadership has no actual opportunity to lobby delegates." PA-18a, and the conventions merely "rubber stamp" the will of the party leaders, *id.* at 45a, 125a-26a. Once the delegates are selected, the two-week interval between delegate selection and the convention hardly provides time for a candidate to seek the support of hundreds of delegates, even if the delegates selected under this statutory scheme were open to persuasion.

The universal lack of competition at the conventions stands as powerful evidence that the statutory delegate-selection process imposes severe burdens on voters and challenger candidates. For a challenger candidate, "access" to a convention whose composition has been rigged by statute imposes severe burdens on any attempt to compete for the party's nomination. For the party's rank-and-file members, such "access" not only never occurs, but would, as admitted by Petitioner Kellner, "twist the design of the system on its head." *Id.* at 17a.

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[13] For this reason, Petitioners' reliance (County Br. 16, 32) on a plurality opinion in *Clements v. Fashing*, 457 U.S. 957, 964 (1982), is unpersuasive. Later cases make clear that the rights of candidates and voters derive from the First Amendment. *See, e.g., Anderson*, 460 U.S. at 786.

II. THE COURT SHOULD APPLY STRICT SCRUTINY

"Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest." *Clingman*, 544 U.S. at 587; *see Jones*, 530 U.S. at 582; *Eu*, 489 U.S. at 222; *Burdick*, 504 U.S. at 434. Petitioners avoid even stating this standard. They argue that, even if the burdens that the statutes impose on associational and voting rights are severe, this Court should abandon strict scrutiny in favor of an undefined "balancing test." *See* County Br. 32-34 (relying on cases outside the election context). The Attorney General does not even contend that the statute would survive strict scrutiny, limiting his defense to "legitimate" interests. AG Br. 24-27.

The Board of Elections argues for doctrinal "flexibility" in applying the First Amendment to elections, but misunderstands the relationship between the First Amendment and the electoral process. A candidate participating in an election is not, as the Board suggests, relegated to diminished First Amendment protection as though the candidate were "in a public prison." BOE Br. 20. To the contrary, First Amendment rights are at their *apex* during elections. *Cf. Eu*, 489 U.S. at 223 ("[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office. Free discussion about candidates for public office is no less critical before a primary than before a general election.") (citations and quotation omitted); *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 405 (2000) (Kennedy, J., dissenting) ("[P]olitical speech in elections [is] the speech upon which democracy depends.")

A. The State Imposes Its Convention System on All Parties

Petitioners argue that two sets of First Amendment rights are in tension—the right of party members to participate in the nominating process and the right of a political party to

adopt rules limiting rank-and-file participation. But this case does not implicate the private organizational choices of a political party. Petitioners' briefs often omit the fundamental fact that the State itself has made a choice that eliminates rank-and-file members from the political parties' nomination process and has imposed that choice on every recognized political party. Petitioners clothe what is clearly a statutory mandate in the garb of private choice.[14]

Petitioners cite no case that has applied their standardless balancing test to a severely burdensome mandatory election law. Rather, they rely on three court of appeals cases that assessed challenges to the autonomously adopted internal rules of the national parties. *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc); *Bachur v. Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987); *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998).[15]

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[14] *See* County Br. 21 ("[A] party can choose to adopt a closed, delegate-based convention system in which voters have 'no direct voice.'"); *id.* at 38 ("[A] party exercises its constitutionally protected right of association through both the structure and conduct of the delegate primary and nominating conventions."); BOE Br. 11 ("[T]he First Amendment does not compel the state to intrude so deeply into political parties' decisions."); *id.* at 27 ("[T]he States may not act 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" (quoting *Eu*)); *id.* at 29 ("This Court has historically been very solicitous of the right of political parties to control their interna candidate selection processes.").

[15] In fact, those cases presented no severe burdens, state-imposed or otherwise. In *Bachur*, "there existed no entry barriers to candidates. Nor did the regulations effectively prevent a party member from voting for their preferred candidate...." PA-53a. In *Ripon*, the lack of a severe burden was obvious. Indeed, the plaintiff could not even "identify with any confidence the set of people whose preferences are to be given equal and accurate expression." 525 F.2d at 585 n.58. And in *LaRouche*, it was "not necessarily clear that the restrictions on plaintiffs were 'severe.'" 152 F.3d at 993.

Indeed, Petitioners' cases explicitly highlighted the fundamental distinction between a system voluntarily adopted by the national political parties and one imposed by state law, as in *Gray v. Sanders*, 372 U.S. 368 (1963). *See Ripon*, 525 F.2d at 589 n.65 (plurality) (In *Gray*, the burden "was mandated by a state statute, applicable to all parties and passed some forty-five years earlier."); *id.* at 607 (Wilkey, J., concurring) (The allocation formula in *Ripon* "was purely the product of party deliberations and actions and was neither compelled, restricted, modified, devised, or encouraged by any state statute or ordinance."); *id.* at 594 (Danaher, J., concurring) ("Were Congress to have acted and to have regulated the composition of the national convention of a major political party, we would have before us a totally different problem."); *id.* at 598-99 (Tamm, J., concurring); *Bachur*, 836 F.2d at 842 ("[E]fforts of the states to regulate delegate selection have been repeatedly rebuffed."); *LaRouche*, 152 F.3d at 990 n.24 (distinguishing autonomous actions of political party from state-mandated candidate-selection statutes).

Petitioners suggest that because one state or local political party might itself determine that some form of convention would further its interests, New York can further those interests by imposing a highly exclusionary convention structure on all parties. That is simply a non-sequitur. The fact that a single party, acting autonomously, might opt for a more or less restrictive system does not give the State license to impose that structure on the membership of all parties by statute. *See Tashjian*, 479 U.S. at 215-25 (striking down state statute forbidding parties to invite independent voters to participate in nomination primary); *Jones*, 530 U.S. at 577 (striking down statute requiring inclusion of non-members).

There may or may not exist a political party in New York whose members want their party's nomination process to function as a rubber stamp for a party leader. But New York's statutes require that, when it comes to selecting su-

preme court nominees, *every* party is *required* to function as the Rubber Stamp Party.

B. A Convention System Is Neither Constitutional Nor Unconstitutional *Per Se*

Petitioners rely on the statement in *American Party* that a state may "insist that intra-party competition be settled before the general election by primary election or by party convention." *Am. Party*, 415 U.S. at 781. But this Court's unremarkable recognition that a party convention may serve as a constitutional method of resolving intra-party disputes does not give a state *carte blanche* to impose a nominating process that effectively excludes a party's members from the nomination process.

The associational rights of party members and challenger candidates attach whether the State structures the nomination contest as a convention or a primary. "If the state chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn.*, 536 U.S. at 788 (quotations and citations omitted). Petitioners acknowledge this, but contend the State can "assign" statutory "roles" to party members that create insuperable obstacles to collective action and bar any meaningful opportunity for them to influence the nomination of their parties' candidates.[16] But the "greater power to dispense" with elections altogether does not include the lesser power to assign "roles" to party members that exclude them

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[16] *See, e.g.*, County Br. 19 ("New York's legislature only gave voters the limited role of voting for delegates and gave delegates the role of choosing candidates."); *id.* ("[T]he critical threshold question becomes what are the roles that have been granted by the states?"); *see also* RNC Br. 9 ("Judicial candidates have no role at this stage and therefore can suffer no burden."). *But see* position at trial of New York Republican *State* Committee, *supra* n.7.

from their own party's nomination process. *See id.*; *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988) (rejecting state's argument that "because the power of the initiative is a state-created right, it is free to impose limitations on the exercise of that right").

Each type of state-imposed nominating process (whether a convention, a primary, or (as here) a hybrid) must stand or fall on whether it imposes unjustifiably severe burdens on the ability of party members to associate in support of common values. Indeed, numerous examples exist of nominating conventions that fully comply with the First Amendment.

Moreover, First Amendment protection of associational rights cannot be bypassed pursuant to a fiction that the statutes further the rights of "parties" (whatever that word can mean when divorced from the membership of the party) in some nebulous way, or that "indirect" democracy is always acceptable without regard to the burdens the particular form of indirect democracy imposes on associational rights. In fact, as the lower courts found, the intent and effect of New York's unique convention scheme is not to resolve intra-party disputes through a form of "indirect" democracy; it is to eliminate democracy altogether by rigging the system to prevent ordinary party members from associating in support of their chosen candidates.

C. The Severe Burdens Found by the Lower Courts Flow from New York's Statutory Scheme, Not from Private Conduct

Petitioners argue that the severe burdens imposed by New York's convention system stem not from statutory provisions themselves, but from the private conduct of party leaders and delegates. BOE Br. 26-29; *see also* RNC Br. 14. But the severe burdens arise here from the way that New York's statutes burden collective action by ordinary party members. Where, as here, "the mechanism of such elections

is the creature of state legislative choice," it must be assessed as state action. *Bullock*, 405 U.S. at 140.[17]

New York's statutory scheme micromanages every aspect of the nomination procedures. The statutes, for example, mandate the widely dispersed set of races to be organized and won simultaneously; demand that a large number of geographically allocated signatures be collected in a short time from a widely dispersed set of shrinking pools of party members; provide no mechanism for delegates to signify on the ballot which candidates they intend to support; and impose the short time between the election and the convention.[18] The evidence established overwhelmingly and the lower courts found as facts—that because only the party leadership has the resources to navigate those statutory obstacles, those leaders predictably pick "reliable" delegates who are not challenged. PA-19a-23a, 109a-10a; *see also Amicus* Br. of John R. Dunne. The convention is necessarily a "rubber stamp" not because New Yorkers are unassertive by nature, but because the statutory structure fences out those

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[17] *See id.* at 140 n.16. ("[W]e are here concerned with the constitutionality of a state law rather than action by a political party and thus have no occasion to consider the scope of the holding in [the White Primary Cases]."); *Republican Party of Va. v. Morse*, 517 U.S. 186, 252 (1996) (Kennedy, J., dissenting) (distinguishing between private acts and statute facilitating "unlawful discrimination in the nominating process"); *Eu*, 489 U.S. at 232 n.22 ("[I]t is state law, not a political party's charter, that places the state central committees at a party's helm, and in particular, assigns the statutorily mandated committee responsibility for conducting the party's campaigns.").

[18] Petitioners observe that one aspect of the statute grants the parties a modicum of discretion to determine the precise number of delegates and alternates elected from each assembly district. But such discretion is severely limited, because the statute provides that the number of delegates must "be substantially in accordance with" a ratio that bounds the parties' discretion. N.Y. Elec. L. § 6-124. The parties *must* choose a number high enough to allow them to satisfy this ratio, and they have historically complied with that requirement. PA-105a-106a.

who do not hold the key to the locked gate imposed by the delegate selection process. The constitutional offense is not the fact that party leaders act as one would expect them to do by choosing nominees, but instead that the state-mandated nominating process prevents any challenges by party members to those leaders' choices.[19]

Petitioners analogize this universal lock-up to "party line" voting in Congress. But the lower courts' findings here reveal an institution of a wholly different character. In Congress, members face reelection and must either respond to the will of their constituents or face the prospect of being voted out of office. Here, by contrast, the voters have no electoral check. The delegates' sole task once in office is to attend a single convention and nominate others to run as candidates for election to public office. Their terms of service are over two weeks after the election and twenty minutes after they have been sworn in. Party members have no way to throw any of them out of "office."

Moreover, the more relaxed level of scrutiny that might apply to a nomination process autonomously chosen by a political party with the consent of its members is simply not applicable here, where State statutes control virtually every action the parties take to carry out the nomination process. Indeed, the statutory scheme actually *precludes* parties from structuring their nomination processes in a more democratic fashion, either in response to the will of their members or to

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[19] Petitioners contend that passing on the merits of this case would draw the courts into a nonjusticiable "political thicket" of evaluating party action. County Br. 41. But this case does not involve autonomous party action. Rather, it tests the constitutionality of state statutes. This Court has squarely held that the constitutionality of such statutes ra ses a justiciable controversy and their validity "cannot be relegated to the political arena." *Williams*, 393 U.S. at 28. This Court has not experienced difficulty in developing manageable judicial standards to measure governmental interference with associational rights.

attract new members disaffected by non-participatory processes adopted by rival parties. By erecting mandatory barriers, the State insulates the choices of party leaders from challenge, prevents any party from offering a more democratic system, and snuffs out electoral competition at the nomination stage.

III. NEW YORK'S STATUTES ARE NOT NARROWLY TAILORED TO ADVANCE COMPELLING—OR EVEN LEGITIMATE—STATE INTERESTS

A. The State's Asserted Interests Do Not Justify the Burdens Imposed by New York's Statutory Scheme

New York's Attorney General asserts three State interests allegedly served by the statutory convention system: dispensing with the need to inform the electorate prior to the nomination; enhancing judicial independence; and promoting racial and geographic diversity by creating "balanced slates." AG Br. 24-27. The State must demonstrate it is "necessary to burden the plaintiff[s'] rights" with the statutory scheme in order to serve those interests. *Anderson*, 460 U.S. at 789; *see Ill. Elections Bd.*, 440 U.S. at 185 ("This requirement is particularly important where restrictions on access to the ballot are involved."). The lower courts correctly found that the asserted State interests are poorly served by New York's nominating system and that the State has tools at hand to promote each State interest by less burdensome means. PA-70a-76a, 172a-82a.

1. Eliminating Voter Education. The State's initial defense is the remarkable theory that the statutes relieve candidates of the need to educate voters at the nomination stage. AG Br. 24. But the State does not have a legitimate interest in foreclosing speech between candidates and voters. The district court correctly characterized this position as a justification for "eliminating elections as a method for selecting judicial officers, not for depriving the voters of their rights

where elections are required." PA-178a. As this Court has held, the State does not have an interest in conducting elections "under conditions of state-imposed voter ignorance." *Republican Party of Minn.*, 536 U.S. at 788; *see id.* at 795 (Kennedy, J., concurring) ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work, compels the abridgment of speech."). In any event, the State itself does not seem to take this interest seriously: it provides for the nomination of all of its other elected judges in primaries. *See* PA-98a, 178a.

2. Judicial Independence. The State next contends that the convention system enhances "the candidates' actual and perceived independence." AG Br. 25; *see* County Br. 40. As several prominent former New York State judges and the American Judicature Society explain, however, "the current convention system undermines rather than enhances public confidence in the judiciary." *Amicus* Br. of Former NY Judges & Am. Judicature Society; *see also Amicus* Br. of Campaign Legal Center, *et al.*, Part I. Even organizations historically opposed to *any* judicial elections find New York's system to be the "worst of all worlds." *See Amicus* Br. of New York State Bar Ass'n *et al.*; *Amicus* Br. of New York County Lawyers' Ass'n. In fact, the system promotes judicial *dependence* on political party leaders, often with shameful consequences. *See Amicus* Brs. of Charles J. Hynes, Edward I. Koch.

3. Diversity. The State next contends the convention system permits "a coordinated slate of candidates" from diverse constituencies, and thereby promotes geographic and ethnic "diversity." AG Br. 25-26. But the record evidence shows New York's supreme court nomination system has disserved diversity of all kinds for decades. PA-74a-75a, 174a; HE-6758 (task force concluding that progress in achieving racial, ethnic and gender diversity was virtually non-existent with respect to supreme court as against other elected courts in New York); HE-5755 (supreme court had a

lower percentage of women on the bench than nearly all other courts in New York); *see Amicus* Br. of AALDEF *et al.*

B. The Interests Asserted by Other Petitioners Do Not Justify the Burdens Imposed by New York's Statutory Scheme

Other Petitioners—but not the State—assert three additional "State" interests: promoting strong party leadership; enhancing a party's "chances of winning"; and avoiding "factionalism." County Br. at 38-39. Petitioners did not assert these interests in the lower courts. In any event, they are not legitimate here, much less compelling.

1. Strong Party Leadership. Some Petitioners contend that New York's unique version of a nominating convention system promotes strong party leadership. *Id.* at 37-38. Whatever the State's interest in promoting party discipline, however, this Court has never held, nor even suggested, that the State has a legitimate interest in fencing out rank-and-file party members from a core moment of choice in order to increase the power of party leaders.

The Board of Elections argues that "[e]fforts to diminish the influence of party leaders are highly problematic." BOE Br. 28. But surely, a state-mandated system that eviscerates *member* influence on the party is even more "problematic."[20] Tilting the balance of power within a political party in the crucial area of nominations is not a legitimate interest. *See Eu*, 489 U.S. at 233 (stating that "a State cannot substitute its

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[20] Lower courts confronting similar questions have explained that the state has no legitimate interest in intervening in intra-party nomination contests in favor of the party leadership against the rank and file. *See Ruddell v. Nat'l Democratic Party*, 508 F.2d 770, 776 (5th Cir. 1975); *Duke v. Cleland*, 5 F.3d 1399, 1404 n.4 (11th Cir. 1993); *Duke v. Connell*, 790 F. Supp. 50, 54 (D.R.I. 1992). *But see Duke v. Massey*, 87 F.3d 1226 (11th Cir. 1996).

judgment for that of the party as to the desirability of a particular internal party structure").

2. Enhancing Parties' Chances of Winning. Some Petitioners suggest that the State's nominating convention system strengthens a party's chance of winning. County Br. 39. To the contrary, even where a party is "pursuing self-destructive acts," the State has no legitimate reason for intruding on associational rights in a paternalistic effort to save the party. *Eu*, 489 U.S. at 227-28; *see also Morse*, 517 U.S. at 274 (Thomas, J., dissenting) ("[T]he selection of a party nominee forms no part of the *government's* responsibility in regulating an election." (internal quotation marks and citations omitted)). It is, moreover, curious to argue that a political party can enhance its chances to "win" by preventing its own members from having an opportunity to participate in determining the party's nominee.

3. Avoiding Factionalism. Finally, some Petitioners argue that the statutes help parties avoid factionalism. County Br. 39. But avoiding factionalism at the nomination stage by smothering dissent is not a legitimate state interest. It is true that a state "may insist that intra-party competition be settled before the general election by primary election or by party convention." *Am. Party*, 415 U.S. at 781; *see Storer*, 415 U.S. at 735 ("The general election ballot is reserved for major struggles; it is not a forum for continuing intra-party feuds."). But the State's legitimate interest is in ensuring that intra-party disputes are settled *before the general election*—not in stifling intra-party disputes *at the nomination stage*. *See Eu*, 489 U.S. at 227 (*Storer* "does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism"). *Eu* held unequivocally that "preserving party unity during a primary is not a compelling state interest." *Id.* at 228. And, in *Timmons*, the Court reiterated that the State's interest in political stability is not a "paternalistic license for States to protect political parties from the consequences of their own internal disagreements."

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997); *see Riddell*, 508 F.2d at 778 ("[T]he solution is not to try to ignore that factionalism in the state exists, but rather for the two factions to have the opportunity to pursue their own political objectives without undue hindrance by the state.").

If anything, the statutes at issue actually *promote* factionalism. Petitioners argue that an immensely popular candidate who was not anointed by the party leader must leave her party in order to participate in the election as an independent, or as the nominee of another party. But a scheme that forces the most popular judicial candidate to run against her party on the general election ballot serves both to fragment the party and "to confuse or mislead the general voting population to the extent it relies on party labels as representative of certain ideologies." *Clingman*, 544 U.S. at 594 (internal quotation marks and citations omitted).

IV. THE SECOND CIRCUIT'S DECISION DOES NOT CAST DOUBT ON THE HISTORICAL OR CURRENT USE OF NOMINATING CONVENTIONS

Petitioners contend that the Second Circuit's decision casts doubt on the national parties' presidential nominating conventions; that it casts doubt on the convention systems of 34 states; and that the legislative history of N.Y. Elec. L. §§ 6-106 and 6-124 supports their defense of the statutes. None of these arguments withstands analysis. The question is not "conventions or no conventions." Each convention system, like each primary, must be judged on its own merits.

First, the national party conventions are not germane. They are created by the parties' own rules, not by state statutes. Moreover, this Court has repeatedly held that national party conventions implicate important national interests as well as associational rights that warrant special protection when *states* attempt to interfere with the national parties' autonomous decisions. *See, e.g., Democratic Party of U.S. v.*

Wisconsin ex rel. La Follette, 450 U.S. 107, 123-24 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 488-91 (1975) (relying on uniquely national role of the national party conventions and the correspondingly weak role for state regulation); *Gray v. Sanders*, 372 U.S. at 378-79; *see supra* p.33 (discussing *Ripon*).

Second, of the 43 conventions in 34 states cited by Petitioners, not one shares the mandatory statutory burdens imposed by New York's system. Seven do not even relate to the nomination of candidates for public office. (*See* Appendix B hereto, ¶ 1.) Seven more operate only to fill vacancies caused by emergencies or by the failure of any candidate to obtain a majority at a primary election (*id.* ¶ 2), a setting where the state has a compelling interest in ensuring that the unexpected vacancy is filled in time for the general election. *See Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 12 (1982). Seventeen apply only to minor parties or unaffiliated assemblages of voters (Appendix B ¶ 3), where conventions may be a more practical way to demonstrate "the required measure of support" among the electorate. *See Am. Party*, 415 U.S. at 783. Six are not mandatory on parties at all, and four of those six leave the delegate selection process and the extent of voter participation entirely to the parties to determine. (Appendix B ¶ 4.) Two simply allow parties to designate or endorse candidates before a primary election. (Appendix B ¶ 5.) The four remaining statutory conventions are distinct from New York's in that they give parties significant autonomy in determining for themselves the structure of the delegate selection process, including whether to permit any party member to vote for nominees in the convention itself.[21]

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[21] Indiana allows each party to determine the procedure for nominating candidates for lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, and superintendent of public instruction. *See* Ind. Code Ann. §§ 3-8-4-1 to [illegible]. Michigan allows parties to determine who votes at conventions to nominate candidates for lieutenant governor,

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Many of these conventions cited by Petitioners are structured to enhance the ability of rank-and-file party members to express their nomination preferences.[22] Similarly, caucus systems like those used in Iowa (and in New York's towns and villages) allow *any* resident party member to attend an open caucus to nominate candidates for local offices and thus impose none of the burdens on party members at issue here.

Third, the actual legislative history of §§ 6-106 and 6-124 rebuts Petitioners' truncated rendition of the statutes' development. In 1890, New York began allowing political parties to nominate candidates by convention. JA-363. Twenty-one years later, New York adopted primary elections for party nominations, but "a candidate could obtain a place on the primary ballot by designation of a party committee or convention, or the candidate could submit designating petitions with the requisite number of valid signatures." *Id.* at 364 (citing N.Y. L. 1911, c. 891). In other words, the State permitted both primaries *and* conventions. In 1913, the State eliminated designation by party committee or convention,

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attorney general, secretary of state, and state board of education, and to set other critical details of the delegate selection process, if there is one. Mich. Const. art. 5, § 21, art. 8, § 3; Mich. Comp. Laws §§ 168.72-74; Mich. Democratic Party Rules, Art. 11; Mich. Republican Party Rules, Art. X. South Dakota, too, leaves the structure and manner of selecting delegates and other critical details regarding the nomination process to the parties themselves to determine in nominating candidates for lieutenant governor, attorney general, secretary of state, state auditor, state treasurer, and certain other offices. S.D. Codified Laws §§ 12-5-21 to 22. And Iowa requires the use of a statewide convention to nominate candidates only for the office of lieutenant governor, and only *after* the gubernatorial primary election takes place. Iowa Code § 43.123.

[22] For example, all members of Michigan's Democratic Party can vote at its state convention. Mich. Democratic Party Rules, Art. 4B. Alabama's statutes provide for primaries as the default nominating mechanism but allow parties to select candidates by "mass meeting, beat meeting, or other voters of the party." *See* Ala. Code § 17-13-50(a).

leaving the primary as the only method of party nomination. *Id.* (citing N.Y. L. 1913, c. 800).

Critics focused on the "distinctly onerous" signature requirements, which created "a special handicap for all but the designees of the party machine." Albert S. Bard, "Some Observations on the Primary and Election Laws of the State of New York With Special Reference to the Nomination and Election of Judges," 15 ABCNY Reports No. 169 at 8 (March 10, 1914). Some critics began promoting a return to a convention system as a means of enhancing rank-and-file participation.

Of course, restoring conventions did not *require* eliminating the role of party members in nominating candidates for elective office. To the contrary, proposals to restore conventions repeatedly *embraced* rank-and-file participation. The 1918 proposal touted by Petitioners (County Br. 2, AG Br. 11) actually would have provided that "proposed delegates may be pledged to the nomination of a certain candidate for a State office... Thus the enrolled voters are given every opportunity to express their will for candidates...." N.Y. Sen. Doc. No. 84 at 3 (March 1, 1918). New York's former Governor, Charles Evans Hughes, urged selection of candidates by convention, with the proviso that "[t]he action of such a body should not be final.... [I]f the candidates, or any of them, which it selected were unworthy, then there should be opportunity for the party members, immediately and without difficulty, to express themselves in opposition and on primary day...." *New York Times* (Nov. 19, 1920).

In 1921, New York restored conventions for statewide offices and supreme court judges, but left in place direct primaries for all other elected judges. The Committee that drafted the legislation at issue here proposed and promoted the Hughes system, with the possibility of rank-and-file participation following the convention. According to the Committee Report, "The nomination by convention, as provided

in the bill, is not absolute. Opportunity is given for calling an additional primary upon the filing of a designating petition.... If such petition be duly filed, the nomination by convention becomes itself a designation, and the party nomination is determined at the extra primary." Report of the Joint Legislative Committee on Election Law, N.Y. Legis. Doc. No. 60 at 6-7 (1921). But the final bill—passed late at night in the rush of the legislative session's final moments and without public scrutiny—omitted this provision. N.Y. L. 1921, c. 479. Given the duopoly power that the statutes bestow on the leaders of the two major political parties, the statutes have proved impervious to change.[23]

V. PETITIONERS' NEW ARGUMENTS ABOUT FACIAL INVALIDITY AND REMEDY ARE UNPERSUASIVE

In their merits briefs, Petitioners raise two arguments concerning remedy. These arguments are unpersuasive.

First, the Board of Elections complains that the lower courts "presented a glaringly insufficient factual basis for facial invalidation." BOE Br. 33.[24] The Board's new accusa-

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[23] That statutes are old is not a sufficient basis to uphold them. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 472 (Thomas, J., dissenting) ("[W]e have never before upheld a limitation on speech simply because speakers have coped with the limitation for 30 years.") (citing *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001) (striking down 67-year old restriction under First Amendment)).

[24] This argument is inappropriate. At the Petition stage, the Board advised the Court that Petitioners' "factual disputes" with the lower courts were "immaterial to this petition." Petition 9; *see* BOE Reply in Support of Cert. at 3 ("the niceties of the New York system are irrelevant"); *accord* County Reply in Support of Cert. at 8 ("a trial on the merits would be pointless"). Yet now Petitioners ask this Court to review the factual findings in detail to determine the validity of a facial challenge. As a general rule, in order to protect its institutional interest in determining which cases to review, this Court does not allow "the able counsel who argue before us to alter these questions or to devise additional questions

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tion cannot be squared with the 10,000-page record of the four-week hearing containing evidence from across the state, nor with the extensive findings of fact marshaled by the district court and affirmed by the court of appeals. No reference to that record appears in the Board's merits brief. In truth, the robust record shows that across New York State, the statutes impose severe burdens on party members and candidates. Facial invalidation is proper where, as here, "any application of the legislation 'would create an unacceptable risk of the suppression of ideas.'" *Sec'y of State v. J.H. Munson Co.*, 467 U.S. 947, 967 n.13 (1984) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 794 (1984)). The record leaves no doubt that the "statute in all its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling state interest." *J.H. Munson*, 467 U.S. at 967 n.13.

Second, Petitioners complain about the form of the district court's preliminary injunction. The district court did not usurp legislative authority, as Petitioners argue. Rather, the court properly severed §§ 6-106 and 6-124 from the remainder of the Election Law which requires supreme court nominations to proceed, for now, under the default provision that governs nomination for all other public offices. N.Y. Elec. L. § 6-110. The district court did not, as Petitioners contend, "mandate" a primary election as a judicial creation out of whole cloth. As the Second Circuit explained, "[i]f the District Court had merely enjoined the current nominating scheme, the default nature of section 6-110 would have resulted in a primary election by operation of law." PA-82a.

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at the last minute." *Taylor v. Freedland & Kronz*, 503 U.S. 638, 645-46 (1992); *Glover v. United States*, 531 U.S. 198, 205 (2001). The Board suggests no reason to depart from that rule here.

Petitioners never proposed any alternate remedy to the district court. Their argument here—that the court should have, in effect, edited §§ 6-106 and 6-124—would have thrust the court into a quasi-legislative role. The court appropriately left that task, in the first instance, to New York's elected representatives. *See Randall*, 126 S. Ct. at 2500 (Breyer, J., for plurality) (declining to "write words into the statute...or to leave gaping loopholes...or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found").

Contrary to Petitioners' suggestion that the lower courts failed to give the Legislature an opportunity to craft a new nomination scheme, the district court *and* the Second Circuit each expressly *invited* the Legislature to craft a new statute. PA-84a, 183a, and the district court has stayed its preliminary injunction for two years. The Legislature has an opportunity to enact a constitutional nominating system if it so desires.

CONCLUSION

For the foregoing reasons, the Second Circuit's decision should be affirmed.

Respectfully submitted.

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APPENDIX A
NEW YORK CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Article VI of New York's Constitution provides in part:

§ 6. a. The state shall be divided into eleven judicial districts....[25]

b. Once every ten years the legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines.

c. The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. The terms of justices of the supreme court shall be fourteen years from and including the first day of January next after their election.

d. The supreme court is continued. It shall consist of the number of justices of the supreme court including the justices designated to the appellate divisions of the supreme court, judges of the county court of the counties of Bronx, Kings, Queens and Richmond and judges of the court of general sessions of the county of New York authorized by law on the thirty-first day of August next after the approval and ratification of this amendment by the people, all of whom shall be justices of the supreme court for the remainder of their terms. The legislature may increase the number of justices of the supreme court in any judicial district, except that the number in any district shall not be increased to exceed one justice for

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[25] Acting under authority granted in Art. VI, § 6(b), the Legislature has superceded this provision in part. *See* Judiciary Law § 140, reprinted *infra*.

fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration. The legislature may decrease the number of justices of the supreme court in any judicial district, except that the number in any district shall not be less than the number of justices of the supreme court authorized by law on the effective date of this article. * * *

§7. a. The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided. In the city of New York, it shall have exclusive jurisdiction over crimes prosecuted by indictment, provided, however, that the legislature may grant to the city-wide court of criminal jurisdiction of the city of New York jurisdiction over misdemeanors prosecuted by indictment and to the family court in the city of New York jurisdiction over crimes and offenses by or against minors or between spouses or between parent and child or between members of the same family or household.

b. If the legislature shall create new classes of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or other courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts.

B. New York's Judiciary Law provides in part:

§ 140. Division of state into judicial districts.

The state is hereby divided into twelve judicial districts, pursuant to the provisions of the first section of the sixth article of the constitution, which districts shall be arranged as follows:

The first judicial district shall consist of the county of New York;

The second judicial district shall consist of the counties of Richmond and Kings;

The third judicial district shall consist of the counties of Columbia, Sullivan, Ulster, Greene, Albany, Schoharie and Rensselaer;

The fourth judicial district shall consist of the counties of Warren, Saratoga, Washington, Essex, Franklin, Saint Lawrence, Clinton, Montgomery, Hamilton, Fulton and Schenectady;

The fifth judicial district shall consist of the counties of Onondaga, Oneida, Oswego, Herkimer, Jefferson and Lewis;

The sixth judicial district shall consist of the counties of Otsego, Delaware, Madison, Chenango, Broome, Tioga, Chemung, Tompkins, Cortland and Schuyler;

The seventh judicial district shall consist of the counties of Livingston, Wayne, Seneca, Yates, Ontario, Steuben, Monroe and Cayuga;

The eighth judicial district shall consist of the counties of Erie, Chautauqua, Cattaraugus, Orleans, Niagara, Genesee, Allegany and Wyoming;

The ninth judicial district shall consist of the counties of Westchester, Putnam, Dutchess, Orange and Rockland;

The tenth judicial district shall consist of the counties of Nassau and Suffolk.

The eleventh judicial district shall consist of the county of Queens....

The twelfth judicial district shall consist of the county of Bronx....

C. New York's Election Law provides in part:

§ 6-106. Party nominations; justice of the supreme court

Party nominations for the office of justice of the supreme court shall be made by the judicial district convention.

§ 6-110. Party nominations; public office

All other party nominations of candidates for offices to be filled at a general election, except as provided for herein, shall be made at the primary election.

§ 6-118. Designation and nomination by petition

Except as otherwise provided by this article, the designation of a candidate for party nomination at a primary election and the nomination of a candidate for election to a party position to be elected at a primary election shall be by designating petition.

§ 6-120. Designation and nomination; restrictions

1. A petition, except as otherwise herein provided, for the purpose of designating any person as a candidate for party nomination at a primary election shall be valid only if the person so designated is an enrolled member of the party referred to in said designating petition at the time of the filing of the petition.

2. Except as provided in subdivisions three and four of this section, no party designation or nomination shall be valid unless the person so designated or nominated shall be an enrolled member of the political party referred to in the certificate of designation or nomination at the time of filing of such certificate.

3. The members of the party committee representing the political subdivision of the office for which a designation or nomination is to be made, unless the rules of the party provide for another committee, in which case the members of such other committee, and except as hereinafter in this subdivision provided with respect to certain offices in the city of New York, may, by a majority vote of those present at such meeting provided a quorum is present, authorize the designation or nomination of a person as candidate for any office who is not enrolled as a member of such party as provided in this section. In the event that such designation or nomination is for an office to be filled by all the voters of the city of New

York, such authorization must be by a majority vote of those present at a joint meeting of the executive committees of each of the county committees of the party within the city of New York, provided a quorum is present at such meeting. The certificate of authorization shall be filed not later than four days after the last day to file the designating petition, certificate of nomination or certificate of substitution to which such authorization relates. The certificate of authorization shall be signed and acknowledged by the presiding officer and the secretary of the meeting at which such authorization was given.

4. This section shall not apply to a political party designating or nominating candidates for the first time, to candidates nominated by party caucus, nor to candidates for judicial offices.

§ 6-124. Conventions; judicial

A judicial district convention shall be constituted by the election at the preceding primary of delegates and alternate delegates, if any, from each assembly district or, if an assembly district shall contain all or part of two or more counties and if the rules of the party shall so provide, separately from the part of such assembly district contained within each such county. The number of delegates and alternates, if any, shall be determined by party rules, but the number of delegates shall be substantially in accordance with the ratio, which the number of votes cast for the party candidate for the office of governor, on the line or column of the party at the last preceding election for such office, in any unit of representation, bears to the total vote cast at such election for such candidate on such line or column in the entire state. The number of alternates from any district shall not exceed the number of delegates therefrom. The delegates certified to have been elected as such, in the manner provided in this chapter, shall be conclusively entitled to their seats, rights and votes as delegates to such convention. When a duly elected delegate does not attend the convention, his place shall be taken by

one of the alternates, if any, to be substituted in his place, in the order of the vote received by each such alternate as such vote appears upon the certified list and if an equal number of votes were cast for two or more such alternates; the order in which such alternates shall be substituted shall be determined by lot forthwith upon the convening of the convention. If there shall have been no contested election for alternate, substitution shall be in the order in which the name of such alternate appears upon the certified list, and if no alternates shall have been elected or if no alternates appear at such convention, then the delegates present from the same district shall elect a person to fill the vacancy.

§ 6-126. Conventions; rules for holding

1. The time and place of meeting of a convention shall be fixed, within the times prescribed herein, by a committee appointed pursuant to the rules of the state committee. The room designated for the meeting place of a convention shall have ample seating capacity for all delegates and alternates. Every convention shall be called to order by the chairman of the committee from which the call originates or by a person designated in writing for that purpose by such chairman, or, if he fails to make such designation, then, by a person designated in such manner as the rules of the party shall prescribe. Such chairman or person designated shall have the custody of the roll of the convention until it shall have been organized. No such convention shall proceed to the election of a temporary chairman or transact any business until the time fixed for the opening thereof nor until a majority of the delegates or respective alternates named in the official roll shall be present. The roll call upon the election of a temporary chairman shall not be delayed more than one hour after the time specified in the call for the opening of the convention, provided a majority of delegates, including alternates sufficient to make up such majority by substitution, are present. The person who calls the convention to order shall exercise no other function than that of calling the official roll of the delegates

upon the vote for temporary chairman and declaring the result thereof.

2. The temporary chairman shall be chosen upon a call of the official roll. The committees of the convention shall be appointed by the convention, or by the temporary chairman, as the convention may order. Where only one candidate is placed in nomination for any office, the vote may be taken viva voce. When more than one candidate is placed in nomination for an office the roll of the delegates shall be called and each delegate when his name is called shall arise in his place and announce his choice, except that the chairman of a delegation from any unit of representation provided for by party rules, unless a member of such delegation objects, may announce the vote of such delegation. The convention may appoint a committee to nominate candidates to fill vacancies in nominations made by the convention and caused by the death, declination or disqualification of a candidate. The permanent officer shall keep the records of the convention.

§ 6-130. Designating petition; signer information

The sheets of a designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed.

§ 6-132. Designating petition; form

1. Each sheet of a designating petition shall be signed in ink and shall contain the following information and shall be in substantially the following form:

I, the undersigned, do hereby state that I am a duly enrolled voter of the _____ party and entitled to vote at the next primary election of such party, to be held on _____, 20__; that my place of residence is truly stated opposite my signature hereto, and I do hereby designate the following named person (or persons) as a candidate (or candidates) for the nomination of such party for public office or for election

to a party position of such party.

Names of candidates	Public Office or party position	Place of Residence (also post office address, if not identical)

I do hereby appoint _____ (insert the names and addresses of at least three persons, all of whom shall be enrolled voters of said party) as a committee to fill vacancies in accordance with the provisions of the election law.

In witness whereof, I have hereunto set my hand, the day and year placed opposite my signature.

Date	Name of Signer	Residence

Town or city (except in the city of New York, the County)

2. There shall be appended at the bottom of each sheet a signed statement of a witness who is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition, and who is also a resident of the political subdivision in which the office or position is to be voted for. However, in the case of a petition for election to the party position of member of the county committee, residence in the same county shall be sufficient. Such a statement shall be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false

statement, shall subject the person signing it to the same penalties as if he or she had been duly sworn. The form of such statement shall be substantially as follows:

STATEMENT OF WITNESS

I, _____ (name of witness) state: I am a duly qualified voter of the State of New York and am an enrolled voter of the _____ party. I now reside at _____ (residence address).

Each of the individuals whose names are subscribed to this petition sheet containing _____ (fill in number) signatures, subscribed the same in my presence on the dates above indicated and identified himself or herself to be the individual who signed this sheet.

I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Date: _____ _____

Signature of Witness

Witness identification information: The following information must be completed prior to filing with the board of elections in order for this petition sheet to be valid.

Town or City County

_____ _____

3. In lieu of the signed statement of a witness who is a duly qualified voter of the state qualified to sign the petition, the following statement signed by a notary public or commissioner of deeds shall be accepted:

On the dates above indicated before me personally came each of the voters whose signatures appear on this petition sheet containing _____ (fill in number) signatures, who signed same in my presence and who, being by me duly sworn, each for himself or herself, said that the foregoing

statement made and subscribed by him or her, was true.

Date: _____

_____
(Signature and official title of officer administering oath)

4. The state board of elections shall prepare a sample form of a designating petition which meets the requirements of this section and shall distribute or cause such forms to be distributed to each board of elections. Such forms shall be made available to the public, upon request, by the state board of elections and each such board. Any petition that is a copy of such a sample shall be deemed to meet the requirements of form imposed by this section.

§ 6-134. Designating petition; rules

1. A designating petition may designate candidates for nomination for one or more public offices or for nomination for election to one or more party positions or both, but designations or nominations for which the petitions are required to be filed in different offices may not be combined in the same petition. If two or more offices having the same title are to be filled for different terms, the terms of office shall be included as part of the title of the office.

2. Sheets of a designating petition shall be delivered to the board of elections in the manner prescribed by regulations that shall be promulgated by the state board of elections, provided, however, that the sheets of any volume of a petition shall be numbered. Such regulations shall be no more restrictive than is reasonably necessary for the processing of such petitions by the board of elections. Such regulations shall be binding on the boards of election in each county and in the city of New York. When a determination is made that a designating petition does not comply with such regulations, the candidate shall have three business days from the date of such determination to cure the violation.

3. If a voter shall sign any petition or petitions designating a greater number of candidates for public office or party position than the number of persons to be elected thereto his signatures, if they bear the same date, shall not be counted upon any petition, and if they bear different dates shall be counted in the order of their priority of date, for only so many designees as there are persons to be elected.

4. A signature made earlier than thirty-seven days before the last day to file designating petitions for the primary election shall not be counted.

5. The use of titles, initials or customary abbreviations of given names by the signers of, or witnesses to, designating petitions or the use of customary abbreviations of addresses of such signers or witnesses, shall not invalidate such signatures or witness statement provided that the identity of the signer or witness as a registered voter can be established by reference to the signature on the petition and that of a person whose name appears in the registration poll ledgers.

6. An alteration or correction of information appearing on a signature line, other than the signature itself and the date, shall not invalidate such signature.

7. A signer need only place his signature upon the petition, and need not himself fill in the other required information.

8. Notwithstanding any other provision of this chapter, the failure to list a committee to fill vacancies or the failure to list at least three eligible voters as a committee to fill vacancies shall not invalidate the petition unless a vacancy occurs which, under law, may be filled only by such a committee.

9. A person other than the subscribing witness may insert the information required by the subscribing witness statement, provided that all subscribing witness information required above the subscribing witness' signature is inserted

either before such subscribing witness signs the statement or in the presence of such subscribing witness.

10. The provisions of this section shall be liberally construed, not inconsistent with substantial compliance thereto and the prevention of fraud.

11. If the number of signatures on any petition sheet is understated in the witness statement, such petition sheet shall not be invalid solely because of such understatement, but such petition sheet will be deemed to contain the number of signatures indicated on such witness statement and the signatures at the end of such petition sheet that are in excess of the number so indicated shall be deemed not to have been filed.

12. A signature on a petition sheet shall not be deemed invalid solely because the address provided is the post office address of the signer provided that proof that such address is the accepted address of such signer is provided to the board of elections no later than three days following the receipt of specific objections to such signature.

13. In addition to the requirement for the signature, the printed name of the signer may be added, provided that the failure to provide a place to print the name or failure to print a name if a space is provided shall not invalidate the signature or petition.

§ 6-136. Designating petitions; number of signatures

1. Petitions for any office to be filled by the voters of the entire state must be signed by not less than fifteen thousand or five per centum, whichever is less, of the then enrolled voters of the party in the state (excluding voters in inactive status), of whom not less than one hundred or five per centum, whichever is less, of such enrolled voters shall reside in each of one-half of the congressional districts of the state.

2. All other petitions must be signed by not less than five per centum, as determined by the preceding enrollment, of the then enrolled voters of the party residing within the po-

litical unit in which the office or position is to be voted for (excluding voters in inactive status), provided, however, that for the following public offices the number of signatures need not exceed the following limits:

(a) For any office to be filled by all voters of the city of New York, seven thousand five hundred signatures;

(b) For any office to be filled by all the voters of any county or borough within the city of New York, four thousand signatures;

(c) For any office to be filled in the city of New York by all the voters of any municipal court district, one thousand five hundred signatures;

(c-1) For any office to be filled in the city of New York by all the voters of any city council district, nine hundred signatures;

(d) For any office to be filled by all the voters of cities or counties, except the city of New York and counties therein, containing more than two hundred fifty thousand inhabitants according to the last preceding federal enumeration, two thousand signatures;

(e) For any office to be filled by all the voters of cities or counties containing more than twenty-five thousand and not more than two hundred fifty thousand inhabitants, according to the last preceding federal enumeration, one thousand signatures;

(f) For any office to be filled by all the voters of any other city or county, or of a councilmanic district in any city other than the city of New York, five hundred signatures;

(g) For any office to be filled by all the voters of any congressional district, twelve hundred fifty signatures;

(h) For any office to be filled by all the voters of any state senatorial district, one thousand signatures;

(i) For any office to be filled by all voters of any assem-

bly district, five hundred signatures;

(j) For any office to be filled by all the voters of any political subdivision, except as herein otherwise provided, contained within another political subdivision, not to exceed the number of signatures required for the larger subdivision;

(k) For any other office to be filled by the voters of a political subdivision containing more than one assembly district, county or other political subdivision, not to exceed the aggregate of the signatures required for the subdivisions or parts of subdivisions so contained; and

(l) For any county legislative district, five hundred signatures.

3. The number of signatures on a petition to designate a candidate or candidates for the position of delegate or alternate to a state or judicial district convention or member of the state committee or assembly district leader or associate assembly district leader need not exceed the number required for member of assembly, and to designate a candidate for the position of district delegate to a national party convention need not exceed the number required for a petition for representative in congress.

6-154. Nominations and designations; objections to

1. Any petition filed with the officer or board charged with the duty of receiving it shall be presumptively valid if it is in proper form and appears to bear the requisite number of signatures, authenticated in a manner prescribed by this chapter.

2. Written objections to any certificate of designation or nomination or to a nominating or designating petition or a petition for opportunity to ballot for public office or to a certificate of acceptance, a certificate of authorization, a certificate of declination or a certificate of substitution relating thereto may be filed by any voter registered to vote for such public office and to a designating petition or a petition for

opportunity to ballot for party position or a certificate of substitution, a certificate of acceptance or a certificate of declination relating thereto by any voter enrolled to vote for such party position. Such objections shall be filed with the officer or board with whom the original petition or certificate is filed within three days after the filing of the petition or certificate to which objection is made, or within three days after the last day to file such a certificate, if no such certificate is filed except that if any person nominated by an independent nominating petition, is nominated as a party candidate for the same office by a party certificate filed, or a party nomination made after the filing of such petition, the written objection to such petition may be filed within three days after the filing of such party certificate or the making of such party nomination. When such an objection is filed, specifications of the grounds of the objections shall be filed within six days thereafter with the same officer or board and if specifications are not timely filed, the objection shall be null and void. Each such officer or board is hereby empowered to make rules in reference to the filing and disposition of such petition, certificate, objections and specifications.

3. When a determination is made that a certificate or petition is insufficient, such officer or board shall give notice of the determination forthwith by mail to each candidate named in the petition or certificate, and, if the determination is made upon specified objections, the objector shall be notified.

§ 6-158. Nominating and designating petitions and certificates, conventions; times for filing and holding

1. A designating petition shall be filed not earlier than the tenth Monday before, and not later than the ninth Thursday preceding the primary election. * * *

5. A judicial district convention shall be held not earlier than the Tuesday following the third Monday in September preceding the general election and not later than the fourth Monday in September preceding such election.

6. A certificate of a party nomination made other than at the primary election for an office to be filled at the time of a general election shall be filed not later than seven days after the fall primary election, except that... a certificate of party nomination made at a judicial district convention shall be filed not later than the day after the last day to hold such convention and the minutes of such convention, duly certified by the chairman and secretary, shall be filed within seventy-two hours after adjournment of the convention. * * *

§ 6-160. Primaries

1. If more candidates are designated for the nomination of a party for an office to be filled by the voters of the entire state than there are vacancies, the nomination or nominations of the party shall be made at the primary election at which other candidates for public office are nominated and the candidate or candidates receiving the most votes shall be the nominees of the party.

2. All persons designated for uncontested offices or positions at a primary election shall be deemed nominated or elected thereto, as the case may be, without balloting

APPENDIX B

STATUTORY PROVISIONS RELATING TO CONVENTIONS OUTSIDE NEW YORK STATE

1. **Statutes pertaining to conventions that do not relate to the nomination of candidates for public office:**

    a. Del. Code. tit. 15, § 3113;

    b. Idaho Code § 34-707;

    c. 10 Ill. Comp. Stat. 5/7-9;

    d. Me. Rev. Stat. tit. 21-A, § 321;

    e. N.H. Rev. Stat. Ann. § 667:21;

    f. Ohio Rev. Code Ann. § 3513.11;

    g. R.I. Gen. Laws § 17-12-13.

2. **Statutes pertaining to conventions that operate only to fill vacancies caused by emergencies or by the failure of any candidate to obtain a majority at a primary election:**

    a. Ariz. Rev. Stat. § 16-342;

    b. Ark. Code Ann. § 7-7-104;

    c. Colo. Rev. Stat. §§ 1-4-103, 402, 701;

    d. Iowa Code § 43.65;

    e. Iowa Code § 43.78;

    f. Ky. Rev. Stat. § 118.105;

g. N.D. Cent. Code §16.1-13-14.

3. Statutes pertaining to conventions that apply only to minor parties or unaffiliated assemblages of voters:

a. Colo. Rev. Stat. § 1-4-1304;

b. Conn. Gen. Stat. § 9-451;

c. Del. Code. tit. 15, §§ 3101A, 3301;

d. Fla. Stat. § 99.0965;

e. Ga. Code Ann. §§ 21-2-170, 172, 180;

f. Iowa Code § 44.1;

g. Kan. Stat. Ann. §§ 25-202, 25-301, 302;

h. Ky. Rev. Stat. § 118.325;

i. Md. Code. Ann., Elec. §§ 5-701, 703.1;

j. N.C. Gen. Stat. §§ 163-96, 163-98;

k. N.M. Stat. Ann. § 1-8-2;

l. Or. Rev. Stat. § 248.009;

m. Or. Rev. Stat. §§ 249.735-.737;

n. Tex. Elec. Code §§ 172.001-.002, 181.001 - 005;

o. Wash. Rev. Code § 29A.20.111, 121;

p. W. Va. Code § 3-5-22;

q. Wyo. Stat. § 22-4-303.

4. **Statutes pertaining to conventions that are not mandatory on parties:**

    a. Ala. Code § 17-13-2, 50;

    b. Neb. Rev. Stat. § 32-616; § 32-710;

    c. S.C. Code Ann. §§ 7-9-70, 100; §§ 7-11-10, 30;

    d. Tenn. Code Ann. § 2-13-203;

    e. Utah Code Ann. § 20A-9-404;

    f. Va. Code Ann. §§ 24.2-508-509.

5. **Statutes pertaining to conventions that allow parties to designate or endorse candidates before a primary election:**

    a. Conn. Gen. Stat. § 9-382-390;

    b. N.D. Cent. Code § 16.1-11-06 to -11.

(27)

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER ATTORNEY GENERAL OF THE STATE OF NEW YORK AS STATUTORY INTERVENOR

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TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTRODUCTION 1

I. Conventions Are Constitutional Even When They Do Not Produce Results That Mirror Direct Primaries. 2

II. Private Conduct, Not New York's Election Law, Is the Cause of the Abuses About Which Respondents Complain. 7

III. The Lower Courts Erred in Ordering Direct Primary Elections. 13

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

CASES

American Party of Texas v. White,
415 U.S. 767 (1974) 2

Ayotte v. Planned Parenthood,
546 U.S. 320 (2006) 15

Bullock v. Carter,
405 U.S. 134 (1972) 9

Burdick v. Takushi,
504 U.S. 428 (1992) 13

California Democratic Party v. Jones,
530 U.S. 567 (2000) 10

Gregory v. Ashcroft,
501 U.S. 452 (1991) 6

Jenness v. Fortson,
403 U.S. 431 (1971) 13

Lubin v. Panish,
415 U.S. 709 (1974) 9

Republican Party of Minn. v. White,
536 U.S. 765 (2002) 5

Storer v. Brown,
415 U.S. 724 (1974) 13

United States v. Booker,
543 U.S. 220 (2005) 15

Cited Authorities

Page

UNITED STATES CONSTITUTION

First Amendment 1, 9

STATE CONSTITUTION

N.Y. Constitution, art. VI 14

STATE STATUTES

N.Y. Election Law

§ 2-106 12

§ 2-110 12

§ 2-112 12

§ 6-104 14

§ 6-108 14

§ 6-110 14

§ 6-124 ..... 4, 8

§ 6-126 ..... 4, 9

§ 6-136 8

§ 6-144 12

§ 6-158 ..... 9, 11

§ 6-202 14

INTRODUCTION

Respondents' argument that the New York statutes on nominating conventions are facially unconstitutional ultimately rests on one basic contention: that the conventions are dominated by party insiders who choose nominees who would not win a direct vote among the rank-and-file party members. This, according to respondents, violates the First Amendment rights of challenger candidates and rank-and-file members.

But respondents fail to grapple with two key points that the Attorney General of the State of New York made in its opening brief. First, delegate-based conventions have long been accepted as a legitimate alternative to direct primaries. And of course conventions will not always produce the same results that a primary would — the point of using a convention instead of a primary is so that the delegates can exercise independent judgment. The Constitution does not require that rank-and-file party members have a direct say in nominating their party's judicial candidates.

Second, the abuses about which respondents complain cannot be blamed on the statutes, which provide ample opportunity for rank-and-file voters to influence the process and for elected delegates to engage in serious debate about the candidates' merits. They are the product of the private conduct of party leaders and voters — conduct that respondents concede is not regulated by the First Amendment. Party members choose their judicial delegates and their party's committee persons who, in turn, choose their county leaders. If the system has been hijacked by party leaders to serve their own interests rather than the party's, it is up to the party members to reign in those leaders. The solution is not, as the lower courts did here, to invalidate the statutes on their face and replace the Legislature's chosen nomination system with an entirely different one.

I. Conventions Are Constitutional Even When They Do Not Produce Results That Mirror Direct Primaries.

1. Respondents do not dispute that delegate-based conventions are deeply rooted in our Nation's history. *See* Attorney General's Pet. Br. at 18-24. Nor do they dispute that delegate-based conventions are not designed to foster candidate-driven campaigns or to produce results that mirror the popular vote. *See* Attorney General's Pet. Br. at 24-27. In view of the long history of using conventions in this country, there can be no real question that they are a constitutional means for selecting candidates. *See American Party of Texas v. White*, 415 U.S. 767, 781 (1974) (it is "too plain for argument" that states may require intraparty competition to be settled by convention or primary).

Respondents nonetheless contend that New York's convention system for nominating Supreme Court Justices is unconstitutional because it "freeze[s]" or "locks out" challenger candidates and makes it more difficult for rank-and-file party members to influence the choice of their party's nominee directly. Resp. Br. at 15, 25. But that is just another way of saying that conventions neither foster candidate-driven campaigns nor produce the same results that direct primaries would. Candidates are not meant to run a slate of pledged delegates who will vote for them at the convention, and it therefore is irrelevant that New York may have too many assembly districts to make it feasible to do so. *See* Resp. Br. at 3. Delegates are supposed to come the convention open to the give-and-take involved in selecting multiple candidates for a set of vacancies throughout the judicial district. It is at the convention that the party is meant to debate the merits of potential candidates and to choose the nominees, not at the delegate-selection stage.

It should be no surprise that under a convention system, rank-and-file members lack a direct voice in choosing their party's nominees. That is the whole point of delegate-based conventions. As the long history of conventions demonstrates, there is no constitutional infirmity in having well-informed representatives convene to debate, compromise, and ultimately nominate candidates for office. Doing so does not "force a political party to accept a candidate it may not want." Resp. Br. at 22. If the party's own elected representatives make the choice in accordance with the party's own rules, the nominee, by definition, represents the party's choice.

Respondents point to nothing in the Constitution or this Court's precedent that requires rank-and-file party members to have a direct, unmediated say in their party's judicial nominations. Nor should there be such a requirement, which effectively would force the State to choose between a purely appointive system and direct primaries or their functional equivalent. Representative democracy lies at the heart of our national traditions, and there is no good reason to prohibit the State from continuing to employ it in this context as well.

2. Perhaps in view of conventions' pedigree, respondents concede that at least some forms of delegate-based nominating conventions are constitutional. *See* Resp. Br. at 43-45. For example, they point to state laws authorizing party leaders to endorse their preferred candidates at pre-primary conventions, but that let the nomination ultimately be decided in direct primary elections. Resp. Br. at 44. Or, respondents suggest, it might be permissible for New York to adopt the model of post-primary nominating conventions, under which delegates elected at primary elections are pledged to vote for specific candidates at the convention — although it is unclear how such a model could work when there are multiple vacancies being filled together. Resp. Br. at 46.

But these models, whatever their merits as a matter of policy, are not true convention systems. They employ conventions only as an add-on to direct primaries. States, of course, are free to adopt these sorts of hybrids, but that does not make it unconstitutional for New York to use the convention method in its purer form.

Respondents also seem to suggest that conventions are constitutionally acceptable when the State leaves it to the political parties themselves to determine who will be a delegate at the party's convention and what role the delegates may have. Resp. Br. at 44. But that undermines their argument that Constitution demands that rank-and-file members have a direct voice in nominations. If it is permissible for the party leadership to close the convention to all but hand-picked party insiders and then to give them only a peripheral role in the nominating process, surely it must be constitutional for New York to place minimal constraints on the party designed to protect the interests of rank-and-file members — for example, requiring that convention delegates be elected by the rank-and-file members and ensuring that those delegates have the right to vote for the candidates of their choice. *See* N.Y. Election Law §§ 6-124, 6-126.

3. Respondents find it significant that New York has retained delegate-based nominating conventions only for the office of Supreme Court Justice, while it has adopted direct primaries for other state offices. Resp. Br. at 27. But this is not, as respondents suggest, evidence that conventions are meant to be unduly burdensome for candidates and voters. Rather, it reflects unique features of the office of Supreme Court Justice, even among judicial offices. The Legislature has reasonably concluded that these features justify a somewhat different nominating process from those that are used for other offices.

Perhaps more so than other public officers, judges must be both qualified and independent. Given those needs, there is no constitutional requirement that voters have a direct say in the choice of judicial officers at all. *See Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). For this reason, the judges of New York's highest court are appointed, as are its judges of various specialty courts. New York's intermediate appellate judges are also appointed, although they are drawn from the pool of elected Supreme Court Justices. For these courts, the need for merit-based selection is viewed as outweighing the interest in direct voter choice.

At the other end of the spectrum, trial judges in New York's local courts are elected directly by the voters, both at primary and general elections. These courts are of limited subject matter and geographic jurisdiction. Voters are more likely to have direct knowledge of the candidates for their local courts without the need for expensive campaigns. The balance thus shifts in favor of direct voter involvement at all stages of the judicial selection process.

For its Supreme Court, New York has struck a different balance. Given the Supreme Court's wide-ranging subject matter and geographic jurisdiction, the candidates' legal qualifications take on even greater importance than for the local courts. At the same time, because of the size of New York's judicial districts, voters have less ability to assess those qualifications on their own, at least without costly campaigning by the candidates. And because voters often must fill multiple vacancies within a judicial district at once, the State has chosen a nominating method that permits parties to create balanced tickets. New York has selected the delegate-based convention system because it allows voters who may not be fully informed about candidates' qualifications to rely on a small set of delegates who can educate themselves and coordinate their efforts at a convention to nominate the best slate of candidates.

Those considerations certainly are debatable, and there may be other reasonable ways to balance the competing interests. But it does not follow, as respondents seem to assume (Resp. Br. at 27), that conventions survive only because they are burdensome and thus serve the purposes of those who would like to abuse them. Conventions serve legitimate interests, and the Legislature's decision to use them for only one category of judicial nominations is entirely reasonable. To be sure, conventions have gone out of fashion in recent decades, and there is a trend toward direct primaries for elective offices. But that does not make New York's choice to use conventions unconstitutional.

4. Contrary to Respondents' accusation, Resp. Br. at 39, New York did not adopt the convention-based model to eliminate voter education or to prevent candidates from communicating with voters. Candidates are free to communicate as they like, either with the voters who elect delegates or with the delegates themselves. The delegate-based nominating convention model merely recognizes that the electorate often has little basis to make an informed judgment when choosing candidates for judicial office, a problem that is exacerbated in large geographic jurisdictions. *See Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991) ("Most voters never observe state judges in action, nor read judicial opinions"). In New York's judgment, conventions have an advantage over direct primaries in this respect while still giving the voters a chance both to influence — indirectly — the selection of the nominee and to choose the candidate of their choice in the general election.

II. Private Conduct, Not New York's Election Law, Is the Cause of the Abuses About Which Respondents Complain.

1. Respondents recognize that they cannot prevail if the problems they perceive with judicial nominations are due to choices made by political parties and their members rather than the operation of state election law. *See* Resp. Br. at 32-33. The First Amendment, they apparently concede, does not regulate private conduct. For example, they admit that single-party dominance in a judicial district — even if it renders the general election a "*pro forma*" exercise — is not itself unconstitutional, because it likely reflects nothing more than the "free electoral choice" of individual voters. Resp. Br. at 11. Similarly, strict party discipline that causes party activists to support decisions made by their leadership does not raise constitutional questions, because it reflects private choices made by the members.

Thus, even if they were correct that the First Amendment guarantees rank-and-file members a direct say in the nomination process, respondents still must show that New York's elections laws *require* — not merely permit — party leaders to dominate the process and exclude the rank-and-file members. *See, e.g.*, Resp. Br. at 36-39. Respondents accept this burden, contending that under New York's election laws "*every* party is *required* to function as a Rubber Stamp Party" dominated by unchecked and abusive party leaders. Resp. Br. at 34-35 (emphasis in original). They also argue that New York's election laws "prevent[] parties from taking internal steps affecting their own process for the selection of candidates by effectively *requiring* political parties to fence out their rank and file members, leaving them with no voice in the parties' nomination process." Resp. Br. at 22 (emphasis added) (quotation marks and citation omitted).

New York's election laws, however, do no such thing. Nothing on the face of the challenged statutes requires that the nomination process be controlled by party leaders or that rank-and-file members be excluded from the nominating process. Rather, New York largely leaves it to the parties themselves to define their pre-convention deliberative processes and the amount of debate that should occur at the convention itself. If respondents think that the process is insufficiently deliberative and open, it is the parties — not the statutes — that they should be blaming.

New York's statutes set forth a basic and neutral framework for the convention system. Rank-and-file party members directly elect delegates from their assembly districts. *See* N.Y. Election Law § 6-124. Within broad parameters, the parties themselves determine the number of delegates to be elected from each assembly district. *Id.* And New York law makes it easy for interested voters to run or help others to run for delegate slots in their assembly district. *See id.* § 6-136(2)(i), (3) (requiring at most five hundred signatures on a designating petition). The statutes neither require delegates to support any particular judicial candidate nor prevent them from doing so. And parties are free to define their own pre-convention processes that might foster open debate and deliberation, such as setting up committees to screen the qualifications of prospective candidates, disseminating written or electronic information to delegates before the convention, or providing opportunities for face-to-face meetings between delegates and potential candidates before the convention.

The convention itself also provides an opportunity for the delegates, again under their party's own internal rules, to convene and deliberate with their party leaders to choose among qualified individuals for the office. New York's laws governing the convention are minimal. They regulate the

timing of the convention, and they require a majority of delegates or alternates to be in attendance before the convention can go forward. N.Y. Election Law §§ 6-126(1), 6-158(5). While parties convene the convention in accordance with their own rules, once convened the delegates are required to elect a chairperson to run the convention. N.Y. Election Law § 6-126. A roll-call vote of all delegates is required any time more than one candidate is placed in nomination for the office. N.Y. Election Law § 6-126(2). But aside from these bare-bones structural provisions, New York's election laws do not tell the parties whom they must consider at the convention, nor do they categorically exclude any qualified person from consideration. In particular, nothing prevents any delegate from submitting the name of any qualified candidate for a nomination.

Indeed, amici Law Professors, who support respondents, recognize that New York's statute "does not facially command that the leadership of the political parties run a coordinated slate of convention delegates; it does not compel convention delegates to 'rubber stamp' the candidates the party leadership supplies; and it does not expressly foreclose individual party members from securing a place on the primary ballot to become a convention delegate from their assembly districts." Amici Law Professors' Br. at 15. At most, amici argue that the State's nominating method "facilitates" domination by party leaders. *Id.* at 16. But that amounts to an argument that the First Amendment regulates the private conduct of political parties, and it certainly offers no basis for invalidating the statutes on their face.

The laws challenged here are thus quite unlike the filing-fee provisions invalidated in *Lubin v. Panish*, 415 U.S. 709 (1974), and *Bullock v. Carter*, 405 U.S. 134 (1972), upon which respondents rely. Resp. Br. at 24-27. In *Lubin* and *Bullock*, this Court struck down state laws that *required*

candidates to pay what was — at least for some — a prohibitive filing fee as an absolute prerequisite to the candidate's participation in primary elections. New York's election laws on their face erect no such absolute barriers. They do not "lock[]" the "gate," "block access," or "fence[] out" any qualified candidate. Resp. Br. 25, 37-38. While not every aspiring candidate may receive serious consideration at the nominating convention, that is neither surprising nor problematic. The whole point of conventions is to allow delegates to screen candidates as they see fit. And if — as respondents and some of their amici believe — the party's elected representatives unduly limit the number of candidates actively considered at the convention, that is a result of the internal decisions of the party, not the mandate of state law.

Respondents also argue that "New York's statutes are unconstitutional for reasons akin to those invoked by this Court in *[California Democratic Party v.] Jones*, [530 U.S. 567 (2000)], where the state mandated a nomination process that created a risk that rank-and-file members would be forced 'to give their official designation to a candidate who is not preferred by a majority or even plurality of its members.'" Resp. Br. at 22 (quoting *Jones*, 530 U.S. at 579). As in *Jones*, they maintain, the true purpose of New York's laws is to force political parties to accept candidates they may not want. Resp. Br. at 22. But the critical difference between the California blanket-primary law at issue in *Jones* and the New York laws challenged here is that California forced parties to cede some of their nominating prerogative to *outsiders* whose interests might be antithetical to those of enrolled party members. New York, by contrast, does not force rank-and-file members or the parties themselves to permit their nominating decisions to be influenced by non-party members. And because party nominations are determined using the party's own internal deliberative processes, by representatives

elected by rank-and-file party members themselves, there is no reason to think that the nominations for the office of Supreme Court Justice are antithetical to the interests of the party's rank-and-file.

2. Respondents complain about the brevity of the two-to-three week period between the date when the judicial delegates are elected (on the first Tuesday after the second Monday in September) and the date when the convention is held (after the first Tuesday following the third Monday in September and before the fourth Monday in September). Resp. Br. at 3. They nowhere explain, however, why two or three weeks are inherently insufficient for interested delegates to obtain information about potential candidates for judicial office. There is nothing to prevent aspiring candidates and party leaders from providing written information to the delegates during that period. Some districts already provide for screening panels to assess the qualifications of a number of candidates, and the results of the screening process or other background information on potential candidates can be provided to the delegates before the convention.

Indeed, aspiring candidates can provide information to prospective delegates well before the September primary because all potential delegates, many of whom are unopposed, are known by early July. All petitions for judicial delegates must be filed at least nine weeks before by the primary elections. *See* N.Y. Election Law § 6-158(1) (providing that petitions "shall be filed not earlier than the tenth Monday before, and not later than the ninth Thursday preceding the primary election"). Nothing prevents aspiring candidates from forwarding information about themselves to potential delegates who have filed petitions, opposed or unopposed. And nothing prevents potential delegates, whether they are opposed or not, from seeking out or reviewing information about potential nominees. The board

of elections of each county is required by statute to keep a list of the names and residences of all candidates who have filed petitions for judicial delegate, and that list is open to public inspection. *See* N.Y. Election Law § 6-144 (requiring that each county board of elections "shall keep a book, which shall be open to public inspection[,] in which shall be entered," among other things, "the names and residences of all candidates named" in petitions).

Thus, if in practice — as respondents believe — candidates find it hard to communicate with delegates, it is not because of the length of the pre-convention period or anything else in the statute. It is because of the private choices of the parties and their members.

3. Respondents ignore another element of private choice: the choice of party leadership. Contrary to respondents' contention, Resp. Br. at 23 n.5, rank-and-file members have a significant role in selecting their party leaders. Rank-and-file members directly elect their party's county committee members at primary elections. N.Y. Election Law § 2-106. These elected committee members in turn elect the party's county chairperson. N.Y. Election Law § 2-112. Rank-and-file members also elect their assembly district leaders at primary elections. N.Y. Election Law § 2-110. Thus, rank-and-file members have a direct or indirect say in the choice of their party's leadership. If the leadership consistently thwarts the rank-and-file members' preferences, the members can select new committee persons and district leaders, or the committee persons themselves can select new county chairpersons. Of course, when party leaders abuse their power to commit illegal acts, the State can and does step in to enforce its criminal and ethics laws.[1] Short of

1. *See* Brief of Amicus Curiae Charles J. Hynes, District Attorney for Kings County, at 16-23 (describing criminal prosecutions of political party leaders in Brooklyn), 24-25 (describing enforcement of ethics laws elsewhere in the State).

illegality, however, it is up to the party members themselves to make course corrections in their leadership. If they fail to act either because they are generally happy with the leadership's actions or because they do not care enough about judicial nominations to demand change, those are private choices that do not implicate the First Amendment.

Respondents also gloss over the private choices made in the general election. *See* Resp. Br. at 29 n.12. Those who are dissatisfied with a party's nominations have the option of running as candidates, or voting for non-party candidates, in the general election. *See* Attorney General's Pet. Br. at 8, 32-33. This Court has routinely considered alternative access to the ballot in cases challenging state laws as unduly burdensome on the associational rights of candidates and voters. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 439 (1992); *Storer v. Brown*, 415 U.S. 724, 737 n.7 (1974); *Jenness v. Fortson*, 403 U.S. 431, 440 (1971). If challenger candidates are unlikely to win the general election, it is not because the State has rigged the process against them. It is because voters value party loyalty and choose to support the decisions of their leaders above all else. But as respondents recognize, Resp. Br. at 11, party loyalty reflects free electoral choice and thus does not raise constitutional questions.

III. The Lower Courts Erred in Ordering Direct Primary Elections.

Should the Court find a constitutional flaw in the State's delegate-based convention system, it should let New York's Legislature decide how to fix the problem rather than imposing the direct primary elections that the Legislature has expressly rejected for Supreme Court nominations. The courts below ordered primaries on the theory that they are the State's default nominating method. But as respondents acknowledge, Resp. Br. at 47, when it restored conventions

in 1921, the Legislature made a deliberate decision not to provide for primaries. And respondents do not dispute that primaries have been debated and rejected in the years since then as well. *See* Attorney General's Opening Br. at 11-12.

New York's election laws provide no answer to how the Legislature would act if its current convention-based system for the office of Supreme Court Justice office were invalidated. Election Law § 6-110 mandates direct primaries only "except as provided for herein." And it is clear that the State has made the choice to use other methods to select candidates for particular offices. For example, appellate judges and judges on many specialized trial courts are appointed. *See generally* N.Y. Const. art. VI. Parties may use caucuses to nominate candidates for certain local offices. *See* N.Y. Election Law §§ 6-108, 6-202. For statewide offices, New York allows each party's state committee to designate the party's candidate for office, and if no other candidate gets more than twenty-five percent of the committee votes cast, the candidate getting the majority vote becomes the party's nominee on the general election ballot. *Id.* § 6-104.

Were New York's current convention-based system for Supreme Court Justices to be invalidated, the Legislature might wish to turn to any of these alternatives. Or it could modify the current system to provide more opportunity for rank-and-file voters to influence their party's nominations, perhaps by providing for pre-convention primaries that would bind delegates, or post-convention primaries that pitted the candidates selected at the convention against others who petitioned their way onto the primary ballot.

The briefs of respondents and their amici make it evident that there is a robust debate about how the New York should choose its Supreme Court Justices. While many decry shortcomings of the current system, not all agree that direct

primary elections are the solution to the problem. For example, amici such as the New York State Bar Association support appointment rather than election of Supreme Court Justices. Br. for amici the City of New York et al., at 2-8. And while they accept the injunction imposed below as an interim measure, they warn that substituting a system of direct primaries in place of party conventions would be a cure "worse than the disease" itself. *Id.* at 4.

In view of the ongoing policy debate about the optimal selection system for Supreme Court Justices, if the Court find the statutes unconstitutional, it should respect the State's choice to rely on delegate-based nominating conventions and tailor its remedy to the specific flaws that make that system unconstitutional. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) ("[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem. . . . [W]e try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.") (quotation marks and brackets omitted). When a statute is constitutionally flawed in some respect, the court must decide what the Legislature would have done had it known about those constitutional flaws. *See United States v. Booker*, 543 U.S. 220, 246 (2005) ("We answer the remedial question by looking to legislative intent. We seek to determine what Congress would have intended in light of the Court's constitutional holding.") (citations and quotation marks omitted). Here, there is no reason to think that the New York State Legislature would have wanted primaries if there were flaws in the convention system. A narrowly tailored remedy, coupled with an opportunity for the Legislature to substitute a different solution if it so chooses, would ensure that the federal courts do not make basic policy choices that properly belong to the State acting through its Legislature.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, et al.,
Petitioners,

v.

MARGARITA LÓPEZ TORRES, et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS KELLNER, NEIL W. KELLEHER, HELENA MOSES DONOHUE AND EVELYN J. AQUILA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 3

I. RESPONDENTS' NEW ARGUMENT, WHICH IS PREDICATED ON RIGHTS BELONGING TO *PARTIES*, MUST BE REJECTED 3

II. RESPONDENTS' UNIMPEDED ACCESS TO THE GENERAL ELECTION BALLOT SATISFIES THEIR ASSOCIATIONAL BALLOT ACCESS RIGHTS 10

III. RESPONDENTS FAIL TO DEMONSTRATE THAT SECTIONS 6-106 AND 6-124 IMPOSE ANY BURDEN ON THEIR ASSOCIATIONAL RIGHTS 15

IV. RESPONDENTS FAIL TO JUSTIFY THE DISTRICT COURT'S EXTRAORDINARY INJUNCTIVE RELIEF 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Party of Tex. v. White, 415 U.S. 767 (1974) 2, 8

Anderson v. Celebrezze, 460 U.S. 780 (1983).....1, 11, 12, 17

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) 7

Bullock v. Carter, 405 U.S. 134 (1972).....4, 12, 13, 14

Burdick v. Takushi, 504 U.S. 428 (1992) 8

Califano v. Yamasaki, 442 U.S. 682 (1979).....20

Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) .....*passim*

Carter v. Dies, 321 F. Supp. 1358 (N.D. Tex. 1970).....14

Clingman v. Beaver, 544 U.S. 581 (2005) 5, 8, 11

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989).....*passim*

FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001).....1, 6

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 4

Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977) 8

Lubin v. Panish, 415 U.S. 709 (1974).....11

Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).....20

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) .....*passim*

Ohio v. Robinette, 519 U.S. 33 (1996) 19

Okla. Tax Comm'n v. Chickasaw Nation,
515 U.S. 450 (1995) 4

Osburn v. Cox, 369 F.3d 1283 (11th Cir. 2004) 7

Renne v. Geary, 501 U.S. 312 (1991) 3, 7, 9

Republican Party of Minn. v. White,
536 U.S. 765 (2002) 3, 9

Sec'y of State v. J.H. Munson Co.,
467 U.S. 947 (1984) 18

Singleton v. Wulff, 428 U.S. 106 (1976) 7

Storer v. Brown, 415 U.S. 724 (1974) 4, 11, 13

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986) 6, 7, 8, 10

United States v. Salerno, 481 U.S. 739 (1987) 19

Virginia v. Hicks, 539 U.S. 113 (2003) 19, 20

Warth v. Seldin, 422 U.S. 490 (1975) 7

STATUTES

N.Y. Elec. L. § 2-112 6

N.Y. Elec. L. § 3-102 20

N.Y. Elec. L. § 3-104 20

N.Y. Elec. L. § 6-106 ..... 3, 16

N.Y. Elec. L. § 6-124 ..... 3, 16, 17

N.Y. Elec. L. § 6-132 17

N.Y. Elec. L. § 6-134 ..... 16, 17

N.Y. Elec. L. § 6-136 17

N.Y. Elec. L. § 6-154 17

N.Y. Elec. L. § 6-158 16

N.Y. Elec. L. § 6-158(5).. 17

RULES

Sup. Ct. R. 14.1(a)..... 19

OTHER AUTHORITIES

Black's Law Dictionary 355 (8th ed. 2004)..... 9

Brennan Center for Justice at NYU Law School, Lopez Torres v. NYS Board of Elections, *available at* http://www.brennancenter.org/stack_detail.asp?key=102&subkey=34412 5

New York State Board of Elections, 2003 General Election Results—Second Judicial District, *available at* http://www.elections.state.ny.us/NYSBOE/elections/2003/2003_2jd.pdf. 15

New York State Board of Elections, General Election Results Certified December 14, 2006, *available at* http://www.elections.state.ny.us/portal/page?_pageid=35,1,35_8301:35_8306&_dad=portal&_schema=PORTAL..... 14

REPLY BRIEF FOR PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, DOUGLAS KELLNER, NEIL W. KELLEHER, HELENA MOSES DONOHUE AND EVELYN J. AQUILA

Respondents contend that Sections 6-106 and 6-124 of the New York Election Law violate the First Amendment right of "members of a recognized political party to participate in the choice of their party's nominees." Resp. Br. 16. Sections 6-106 and 6-124 are said to burden the associational rights inuring to "party members" in two ways: Respondents argue that, by "requiring political parties to fence out" from the nomination process "their rank-and-file," the two statutes impermissibly interfere with the right of party members to select autonomously the candidates who will represent the party in the general election. *Id.* at 22 (citing *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000)). Alternatively, respondents contend that the two statutes, "'practically, if not formally, exclud[e]'" "challenger candidates" "from the nomination process,'" *id.* at 25 (quoting Pet. App. 45), and thereby impermissibly burden the ability of those candidates and "like-minded members of their parties" to associate with one another. *Id.* at 25, 26 (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). Both contentions—the new and the not new—lack merit.

As to respondents' first theory, if, as respondents now for the first time suggest, the challenged statutes interfere with the ability of *party members* to select their parties' nominees, they must also and equally impede the ability of the *parties* to do the same, for "parties' rights are [at least] the sum of their members' rights." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 448 n.10 (2001). Yet the *parties* do not press this claim; indeed, they intervened to oppose it. This Court's standing doctrine does not permit dissident *party members* to assert the rights and interests of the whole of their *parties*—particularly where the parties deny that they are injured at all. But even if respondents had standing to bring such a claim, this Court's decision in

American Party of Texas v. White, 415 U.S. 767 (1974), forecloses it. There, in confirming the States' authority to "insist that intraparty competition be settled before the general election . . . by party convention," *id.* at 781, this Court endorsed precisely the "fenc[ing] out" of the "rank-and-file" of which respondents here so bitterly complain. Resp. Br. 22.

Respondents' second theory—the sole basis for the injunctive relief awarded by the courts below—fares no better. The question is not—as respondents put it—whether Sections 6-106 and 6-124 burden "*party members*' and candidates' access to the ballot . . at the *nomination phase*." Resp. Br. 17 (emphases added). Rather, the question is—as the Second Circuit put it—whether Sections 6-106 and 6-124 impose severe burdens on the right of "candidates and *voters* . . . to . . . associate through[] *the State's chosen electoral process*." Pet. App. 44 (emphases added). This Court's decision in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), is dispositive of the latter inquiry, holding that state laws limiting ballot access do not "substantially burden[]" associational rights so long as the State affords candidates and like-minded voters a reasonable opportunity to associate in the context of a "ballot-connected campaign." *Id.* at 198, 199. Neither respondents nor their *amici* have any answer to *Munro*, except to argue that the general election should not be deemed a "ballot-connected campaign" because historical patterns of "one-party rule" render that event a *fait accompli*. Even if that were the case uniformly throughout the State—and, as respondents acknowledge, it is not—respondents suggest no reason why an election must be "up for grabs" before it can offer voters and candidates an opportunity to associate. The competitiveness of general elections would matter only if the right of association included a "'right to win,'" a proposition that respondents themselves reject. *See* Resp. Br. 21 (quoting Pet. App. 45).

Even indulging the assumption that the First Amendment confers upon "members of a recognized political party" a

unique associational right "to participate in the choice of their party's nominees," Resp. Br. 16, respondents have failed to demonstrate that either Section 6-106 or Section 6-124 imposes any significant burden on that "right." Respondents rail against a "'network of restrictive regulations,'" *id.* at 4 (quoting Pet. App. 53), but the *challenged statutes* require only that: (i) party nominations be made at judicial district conventions; (ii) the conventions be comprised of delegates elected at the delegate primary; and (iii) that there be at least one delegate from each assembly district. N.Y. Elec. L. §§ 6-106, 6-124. They nowhere require candidates "to assemble and run a slate of delegates." Resp. Br. 25. Quite the contrary: Sections 6-106 and 6-124 provide that it is the delegates who select the candidates—not the converse. Respondents nowhere suggest that Section 6-106 or Section 6-124 impose burdens on the ability of party members to choose like-minded *delegates*. Thus, it seems that respondents want not "'the First Amendment rights that attach to their roles.'" *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)). Rather, they want different "roles." But that plea is far more appropriately directed to the New York State Legislature.

ARGUMENT

I. RESPONDENTS' NEW ARGUMENT, WHICH IS PREDICATED ON RIGHTS BELONGING TO *PARTIES*, MUST BE REJECTED

In their brief on the merits, respondents invoke this Court's decisions in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), and for the first time advance the argument that Sections 6-106 and 6-124 impermissibly interfere with the rights of political parties and their members to define the contours of their association and to determine their candidates for the general elec-

tion. Specifically, respondents contend that Sections 6-106 and 6-124 "requir[e] political parties to fence out their rank-and-file members" and thereby "'prevent . . . parties from taking internal steps affecting their own process for the selection of candidates.'" Resp. Br. 22 (quoting *Eu*, 489 U.S. at 227). Without even a trace of irony, respondents—self-described "insurgent candidates" and their supporters—suggest that Sections 6-106 and 6-124 operate to "'saddle[]'" political parties "'with [] unwanted, and possibly antithetical, nominee[s].'" *Id.* at 23 (quoting *Jones*, 530 U.S. at 579).

That respondents assert this entirely new ground for relief as their *primary* basis for affirmance is an implicit, but nonetheless startling, confession of the legal infirmity of the decisions below. For at least three reasons, however, this argument, too, fails to sustain the lower courts' judgments.

A. Respondents cannot at this late hour advance an argument that "was neither raised nor considered below." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999). It is the longstanding policy of this Court that, "only in the most exceptional cases," will it "entertain issues withheld until merits briefing." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457 (1995) (citation and internal quotation marks omitted).

Through three-and-one-half years of litigation in three different courts, respondents never once argued that Sections 6-106 and 6-124 interfere with the ability of political parties to select their candidates for the general election. To the contrary, in the district court, in the court of appeals, and in opposing *certiorari* in this Court, respondents argued only that the statutes violated the right—supposedly found in this Court's ballot access decisions (most prominently, *Storer v. Brown*, 415 U.S. 724 (1974), and *Bullock v. Carter*, 405 U.S. 134 (1972))—of insurgent candidates to participate and com-

pete in political parties' nomination processes.[1] And accordingly, neither the Second Circuit nor the district court ever addressed the question respondents now pose—whether Sections 6-106 and 6-124 interfere with the right of political parties and their members to select the candidates who will be their standard-bearers. Any doubt about that is resolved by respondents' own brief in opposition, which recognized that it was the "ballot access cases that undergird the Second Circuit's decision" (Br. in Opp. 19), and found no occasion even to cite either of the two cases (*Jones* and *Eu*) that respondents *now* suggest mandate a ruling in their favor.

Inasmuch as respondents have failed to identify any "unusual circumstances" that could overcome the many prudential considerations that counsel against addressing arguments not pressed or passed upon below, the Court should decline to entertain respondents' new argument. *See Clingman v. Beaver*, 544 U.S. 581, 598 (2005).

B. One reason respondents may have declined to raise this argument below is that they rather obviously lack standing to do so. Respondents contend that Sections 6-106 and 6-124 violate "the associational rights of party members" (Resp. Br. 24) by interfering with the "'[parties'] own process for the selection of candidates,'" and thereby fostering the possibility that "rank-and-file members would be forced 'to give their official designation to a candidate who is not preferred by a majority or even plurality of party members.'" *Id.* at 22 (quoting *Eu*, 489 U.S. at 227, and *Jones*, 530 U.S. at 579). In arguing that Sections 6-106 and 6-124 impermissibly interfere with "the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Jones*, 530 U.S. at 575 (quoting

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[1] All pertinent lower court filings may be found at a website published by counsel for respondents. *See* Brennan Center for Justice at NYU Law School, Lopez Torres v. NYS Board of Elections, *available at* http://www.brennancenter.org/stack_detail.asp?key=102&subkey=34412.

Eu, 489 U.S. at 224), respondents seek to vindicate not just their rights as "party members," but the rights of their *parties*, which is to say, at least the sum of the rights of *all* of the members of those parties. *See Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 448 n.10 ("political parties and other associations derive rights from their members").[2]

In this respect, this case stands quite apart from *Jones* and *Eu*. In *Jones*, it was four political parties that challenged the State's blanket primary law in furtherance of the parties' and their members' interest in ensuring that their nominees were selected by party members. *See* 530 U.S. at 571. In *Eu*, "the official governing bodies of political parties," including "[v]arious county central committees of the Democratic and Republican Parties," challenged California laws interfering with internal party governance and prohibiting those governing bodies from endorsing candidates in primaries, and thereby preserved each party's autonomy over its affairs, including debates over its nominees. 489 U.S. at 217, 219. Similarly, in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), it was the State's Republican Party that

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[2] In an effort to manufacture an injury personal to "party members," respondents argue that "[t]he associational rights of rank-and-file members are of independent significance and warrant constitutional protection, separate and apart from the interests of party leaders." Resp. Br. 21. This might be true if "party leaders" were not also "party members," but such is not the case. If respondents mean to distinguish between "rank-and-file members" and other "party members," they suggest no basis for doing so, nor for believing that respondents better represent the interests of the "rank-and-file" than the parties with which they voluntarily have associated and the party leaders they have elected. *See* N.Y. Elec. L. § 2-112. Finally, to the extent that respondents suggest that "party members" have rights distinct from those of their parties, their brief elsewhere forcefully rejects the proposition. *See* Resp. Br. 36 (deriding the "rights of 'parties' (whatever that word can mean when divorced from the membership of the party)"). And, indeed, if members' and parties' rights are not coterminous, *Colorado Republican Federal Campaign Committee* strongly suggests it is only because "parties' rights are more than the sum of their members' rights." 533 U.S. at 448 n.10.

preserved the parties' ability to determine for themselves the contours of their association by challenging the State's closed primary law. *Id.* at 211.

It would be a bizarre and chaotic world if dissident members of a political party could sue, for example, to strike down a closed primary law on the associational autonomy ground asserted in *Tashjian*, and could do so even against the wishes of the party whose rights the dissident members purported to assert. And, indeed, this Court's standing doctrine does not admit of such absurdities. It establishes instead, sensibly, "that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Accordingly, in a challenge to a state election law brought by party leaders, this Court suggested "that rights the committee members can exercise only in conjunction with the other members of the committee must be defended by the committee itself." *Renne v. Geary*, 501 U.S. 312, 320 (1991); *see also Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 (1986) ("Generally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." (footnote omitted)); *Osburn v. Cox*, 369 F.3d 1283, 1287 (11th Cir. 2004) ("standing to challenge a state's regulation of a political party's primary belongs only to the party itself").

Among the many sound rationales for limiting third-party standing is that, in some cases, "the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976). That rationale is surely applicable here, where the political parties whose rights respondents seek to vindicate not only "do not wish to assert them," but have intervened (in an exercise of their "association[al] . . . standing to bring suit on behalf of [their] members," *Hunt v. Wash. State Apple*

Adver. Comm'n, 432 U.S. 333, 343 (1977)) to oppose respondents' lawsuit.

C. Assuming they could obtain standing to assert it, respondents' contention that the First Amendment is offended by any state law that "effectively requir[es] political parties to fence out their rank-and-file members" from the "nomination processes" proves far too much. Resp. Br. 22.

1. States have "broad power . . . over the elect on process for state offices." *Clingman*, 544 U.S. at 586 (quoting *Tashjian*, 479 U.S. at 217); *see also Burdick v. Takashi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections."). While that power is not without boundaries—States may not regulate "internal party governance," *Eu*, 489 U.S. at 230-31, "forc[e] political parties to associate with those who do not share their beliefs," *Jones*, 530 U.S. at 586, or prohibit a political party from doing the same, *see Tashjian*, 479 U.S. at 224-25—this Court previously has considered it "too plain for argument . . . that the State," just as it "may insist that intraparty competition be settled before the general election by primary election," also "may insist that intraparty competition be settled . . . *by party convention*." *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (emphasis added).

Respondents suggest that their new argument does not call into doubt the constitutionality of *all* conventions; they allow that "a party convention *may* serve as a constitutional method of resolving intra-party disputes." Resp. Br. 35 (emphasis added). A convention that "effectively excludes a party's members from the nomination process," however, cannot in respondents' view pass constitutional muster. *Id.* Yet there is no indication in *American Party* that the Court, in finding "convention[s]" to be "plain[ly]" constitutional, meant to limit the term only to those "convention[s]" open to all of a party's members. Indeed, to "[in]clude" the party's rank-and-file members in a convention is to transmogrify it.

By definition and common usage, party conventions generally do not include the rank-and-file members. *See* Black's Law Dictionary 355 (8th ed. 2004) (providing the "parliamentary" definition of "convention" as "a deliberative assembly that consists of delegates elected or appointed . . . within a state or national organization, or elected directly from the organization's membership"). This Court's embrace in *American Party* of conventions as a constitutional method for settling intra-party disputes thus can only be viewed as affirming the States' authority to exclude parties' rank-and-file members from participating in those same disputes.

2. In any event, Sections 6-106 and 6-124 do *not* "fence out" rank-and-file party members in the manner respondents suggest. To the contrary, Section 6-124 *invites* the participation of party members in the delegate primaries. Respondents do not dispute this, but argue that the benefits they draw from such participation are but a shadow because few persons who share their views are "willing 'to contribute significant energy, time, and money to run as delegates.'" Resp. Br. 7 (quoting respondents' witness). (Even those who do make the investment respondents deride as "lone gadfl[ies]." *Id.* at 26.) But the apathy pervading respondents' ilk is hardly a "direct and inevitable consequence of New York's statutory scheme." *Id.* at 2; *see also Munro*, 479 U.S. at 198 ("States are not burdened with a constitutional imperative to reduce voter apathy"). It reflects, if anything, the powerful influence of party leaders. *See* Resp. Br. at 7 (suggesting that delegates who openly oppose party leaders "'jeopardiz[e] their political future'"). As respondents concede, however, "the fact that party leaders act as one would expect them to" "is not" a "constitutional offense." *Id.* at 38.

Thus, it seems that respondents' real complaint in this case is not that New York has failed to accord to them "'the First Amendment rights that attach to their roles.'" *Republican Party of Minn.*, 536 U.S. at 788 (quoting *Reme*, 501

U.S. at 349 (Marshall, J., dissenting)). Respondents instead want different, more powerful roles in the nomination process. But this Court's cases make clear that the First Amendment does not require States to accede to political parties' wishes—let alone the particular wishes of any dissident party member.[3]

II. Respondents' Unimpeded Access To The General Election Ballot Satisfies Their Associational Ballot Access Rights

Advancing in the alternative the rationale upon which their injunctive relief is premised, respondents contend that Sections 6-106 and 6-124 violate the First Amendment because they place severe burdens on the ability of insurgent candidates to access the ballot and to associate, in that context, with like-minded voters. They argue that reasonable access to the general election ballot provided by state law is insufficient. According to Respondents, the First Amendment requires "access to the ballot at both the nomination phase and the general election." Resp. Br. 17. Alternatively, they contend that access to the general election ballot fails to afford insurgent candidates a genuine opportunity to associate with voters, because those elections are dominated historically by one major party or another. Neither contention withstands scrutiny.

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[3] Even if New York law completely excluded rank-and-file members from party nomination processes, such a restriction would infringe upon parties' associational rights only to the extent that the restriction threatened to distort the associations' expressive character, either by directly limiting their speech, *see Eu*, 489 U.S. at 224, or interfering with their ability to identify "'who constitute[s] the association,'" *Tashjian*, 479 U.S. at 214, and who does not, *see Jones*, 530 U.S. at 586. Respondents have not even attempted to show how "vest[ing] *de facto* appointive power in . . . party leaders" distorts the associational ideals of their political parties. Resp. Br. 26.

A. As noted in the Board's opening brief (at 22-23), this Court has concluded that a ballot access restriction violates the First Amendment only when the restriction presents "an absolute bar to candidacy." *Storer*, 415 U.S. at 737 (upholding one-year disaffiliation requirement for ballot access for independent candidates); *see also Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983) ("the challenged Ohio statute totally exclude[s] any candidate" failing to comply with its early filing deadline). Respondents nowhere dispute that this is the law, but they still contend that reasonable access to the general election ballot is insufficient to dispose of their First Amendment claim. *See* Resp. Br. 29. "*[A]ll* state-imposed severe burdens on ballot access," respondents assert, "must survive strict scrutiny." *Id.* at 30 (emphasis in original). That is a correct statement of the law, but it has little relevance here. Respondents fail to recognize what this Court has repeatedly made clear: state laws that leave open "reasonable alternative means of ballot access," as a categorical matter, do *not* impose significant burdens on ballot access. *Lubin v. Panish*, 415 U.S. 709, 718 (1974); *see also Clingman*, 544 U.S. at 592 ("not every electoral law that burdens associational rights is subject to strict scrutiny," which is "appropriate only if the burden is severe").

Munro is dispositive of this point. There, this Court rejected a challenge to restrictions on access to a *general election* ballot on the ground that the candidate was permitted to wage a ballot-connected campaign in a statewide blanket *primary*. *See Munro*, 479 U.S. at 198-99. In so doing, this Court reasoned that the "channel[ing] [of] expressive activity into a campaign at the primary as opposed to the general election" did "not substantially burden[] the 'availability of political opportunity.'" *Id.* at 199 (quoting *Lubin*, 415 U.S. at 716). If channeling expressive activity into blanket primaries—with their generally low voter turnout—imposes "no[] substantial[] burden[]" on the ability of candidates and voters to associate with one another, it follows *a fortiori* that chan-

neling expressive activity into general elections—with their higher turnout—imposes no greater burden on associational rights. *Munro*, 479 U.S. at 199. If there could be doubt that this is the import of *Munro*, it would be put to rest conclusively by the dissenting opinion, which chastises the majority for its holding "that access to *any* ballot is always constitutionally adequate." *Id.* at 201 (Marshall, J., dissenting) (emphasis in original).

Respondents have no answer to *Munro*. Respondents cite *Bullock* and *Lubin* (at 29-30), but those decisions could not possibly undermine the later-decided *Munro*, and their analyses are consistent with *Munro*, in any event. (Indeed, *Munro* relied on *Lubin*. *See* 479 U.S. at 199.) Respondents' strained efforts to recast them as free speech cases notwithstanding, both *Bullock* and *Lubin* were decided on an equal protection rationale, as both this Court and those below have recognized. *See Anderson*, 460 U.S. at 786-87 n.7 (recognizing *Bullock* and *Lubin* as "resting on the Equal Protection Clause of the Fourteenth Amendment"); Pet. App. 43 (citing *Bullock*, 405 U.S. at 144, 145-49, and characterizing it as decided "pursuant to the Equal Protection Clause of the Fourteenth Amendment").[4]

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[4] Respondents' complaint (at 29) that providing access only to the general election compels insurgent candidates and the voters that support them to "abandon their party affiliations" is makeweight. Respondents' dispute *none* of the arguments that the Board directed to this point in its opening brief (at 24-25). And respondent López Torres's own experience demonstrates that New York hardly requires that insurgent candidates "abandon their party affiliation" to avail themselves of the opportunity to associate with voters in the general election. In the district court, respondents trumpeted the fact that, in 2003, López Torres obtained the nomination of the Working Families Party (at that party's judicial district convention, incidentally) and ran under that party's banner in the general election *"though she remain[ed] a registered Democrat."* Pls. Proposed Findings of Fact ¶ 162 (emphasis added).

That sets those cases apart: the First Amendment right of association is not co-extensive with the Fourteenth Amendment right to be free from discrimination. The Equal Protection Clause applies in some circumstances where the First Amendment applies only with diminished force. Accordingly, some ballot access restrictions, though patently and invidiously discriminatory, may nevertheless comport with First Amendment associational rights because they do not present "an absolute bar to candidacy," i.e., they leave ample opportunity for association. *Storer*, 415 U.S. at 737. But the opportunity for association elsewhere is no cure for the injury to the distinct right to be free from state-sponsored invidious discrimination. *See Bullock*, 405 U.S. at 146-47.

B. In the face of *Munro*, respondents and their *amici* retreat to the argument—made to great effect below—that patterns of single-party dominance throughout the State, though "not inconsistent with free elections" (Resp. Br. 27), nevertheless nullify any opportunity that the State provides to candidates and voters to associate in the general elections. Respondents contend, in so many words, that general elections do not count.

There is little basis in fact for respondents' assertion that "the general election for supreme court is virtually always 'little more than ceremony.'" Resp. Br. 11 (quoting Pet. App. 23). As respondents' *amicus* ACLU recognizes, there exist "districts where one party does not necessarily predominate." Br. Amicus Curiae of the ACLU and N.Y. Civil Liberties Union in Supp. of Resp. 7. The district court similarly observed that, between 1990 and 2002, nearly one quarter of general elections across New York State were competitive. *See* Pet. App. 130. Further belying claims of single-party dominance is respondents' own acknowledgement that, "'[i]n districts that are not dominated by a single party,'" major parties routinely cross-endorse candidates. Resp. Br. 12 (quoting Pet. App. 130). The district court took note of this practice in the Second, Third, Fifth, Eighth, Tenth, and Twelfth Judicial District—*one half* of the State's 12 judicial

districts. *See* Pet. App. 130, 130 n.26. And, indeed, in 2006, Democratic candidates prevailed in several judicial districts previously dominated by the Republican Party. *See* New York State Board of Elections, General Election Results Certified December 14, 2006, *available at* http://www.elections.state.ny.us/portal/page?_pageid=35,1,35_8301:35_8306&_dad=portal&_schema=PORTAL.

A State in which at least half of the judicial districts "'are not dominated by a single party,'" Resp. Br. 12 (quoting Pet. App. 130), hardly resembles Texas in 1970—a place and time when, for "the overwhelming majority of . . . political offices nomination by the Democratic Party [wa]s tantamount to election." *Carter v. Dies*, 321 F. Supp. 1358, 1363 (N.D. Tex. 1970) (Thornberry, J., concurring) (cited in *Bullock*, 405 U.S. at 146 n.26). The court of appeals nevertheless found the Texas-*circa*-1970 analogy to be apt, *see* Pet. App. 50, and apparently, so do respondents. *See* Resp. Br. 28.

But even if New York were exactly as respondents and the court of appeals imagined it, respondents suggest no reason why the outcome of a general election must be in doubt before it may serve as an adequate platform for the candidates to associate with like-minded voters. There is no reason to believe that the absence of major-party competition actually impedes the ability of insurgent candidates to associate with voters; if anything, the absence of competition in the marketplace of ideas should enhance the ability of insurgent candidates to connect with voters.[5]

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[5] Moreover, as the Republican National Committee explains, according constitutional significance to the mutable voting patterns of any particular jurisdiction leads to haphazard enforcement of electoral associational rights. If the constitutionality of a provision can hinge on whether that jurisdiction is currently experiencing an episode of "one-party rule," then a court reviewing an identical provision in another jurisdiction might reach the opposite outcome, unless it, too, is then experiencing one-party rule. *See* Br. Amicus Curiae of the RNC in Supp. of Pet'rs. 26

Respondent López Torres is a case in point. In 2003, she ran for supreme court justice in New York's Second Judicial District under the banner of the Working Families Party, having earlier obtained that party's nomination at its judicial district convention. Despite the fact that the Republicans and Democrats cross-endorsed five candidates, López Torres took her campaign to the judicial district's voters and more than 35,000 of them ultimately cast ballots for her in the general election. *See* New York State Board of Elections, 2003 General Election Results—Second Judicial District, *available at* http://www.elections.state.ny.us/NYSBOE/elections/2003/2003_2jd.pdf.

That López Torres ultimately "lost by a massive margin to the Democratic Party's candidates," Compl. ¶ 96, could possibly be relevant only if the right of candidates and voters to associate for the advancement of political beliefs within the context of a "ballot-connected campaign," *Munro*, 479 U.S. at 198, subsumed a right to prevail in that electoral contest, which even respondents disclaim. *See* Resp. Br. 21 ("As the Second Circuit observed, challengers and their supporters have no 'right to win.'") (quoting Pet. App. 45); *see also Munro*, 479 U.S. at 198 ("States are not burdened with a constitutional imperative . . . to 'handicap' an unpopular [primary] candidate to increase the likelihood that the candidate will gain access to the general election ballot."). Voters in the Second Judicial District had ample "opportunity to cast a ballot for [López Torres] and [she] had [a] ballot-connected campaign platform from which to espouse . . . her views," which is all that the First Amendment requires. *Munro*, 479 U.S. at 198.

III. Respondents Fail To Demonstrate That Sections 6-106 And 6-124 Impose Any Burden On Their Associational Rights

Substituting overwrought hyperbole for legal analysis, respondents contend that, through its elections laws, "New

York has mandated 'the smoke-filled room' as the method for all parties to nominate candidates for the supreme court bench," and, indeed, has "rigg[ed] the process" to "require that, when it comes to selecting supreme court nominees, *every* party is *required* to function as the Rubber Stamp Party." Resp. Br. 24, 26 34-35 (emphases in original). But tellingly, neither respondents nor their many *amici* ever deign to discuss the text of the two statutes they claim to be facially unconstitutional. As in the courts below, respondents urge this Court to focus on "the reality of Supreme Court elections in present-day New York," without regard to the authors of that "reality." Pet. App. 10.

The statutory language here at issue thus bears repetition: Section 6-106 of the New York Election Law provides that "[p]arty nominations for the office of justice of the supreme court shall be made by the judicial district convention." N.Y. Elec. L. § 6-106. Section 6-124 further provides that each judicial district convention "shall be constituted by the election at the preceding primary of delegates . . . from each assembly district," and that "[t]he number of delegates . . . shall be determined by party rules." N.Y Elec. L. § 6-124.

Respondents contend that this "statutory scheme" imposes six "obstacles" that "combine to create a burden on association." Resp. Br. 2, 3. *But see* Pet. App. 57-58, 61 (listing as the severe burdens imposed by New York law only (1) the expense and effort of running "a slate of delegates" and (2) the influence of party leaders over elected delegates). But *five* of these six "obstacles" result not from the operation of Section 6-106 or Section 6-124, but rather *other laws not at issue in this case*.[6] Respondents cannot in the guise of exam-

[6] Those five "obstacles" are: (*i*) "The entire slate of candidates for delegates and alternates in each [Assembly District] must be identified and recruited nearly four months before the primary." Resp. Br. 6 (citing N.Y. Elec. L. §§ 6-134, 6-158). (*ii*) "Each slate of delegates in each [Assembly District] or part of an [Assembly District] must file its *own* 500-plus signature petition [signed by registered party members in a particular

ining "New York's system" "'in a realistic light,'" Resp. Br. 2 (quoting *Anderson*, 460 U.S. at 786), enlarge their complaint, which makes clear which are the "Challenged Provisions of Law." Compl. ¶¶ 23-26.

The only "obstacle" that is even arguably traceable to Sections 6-106 or 6-124 is the "geographically dispersed delegate contests in every one of the numerous Assembly Districts located in each Judicial District." Resp. Br. 3 (citing N.Y. Elec. L. § 6-124). But the requirement that each assembly district be represented at the judicial district convention could possibly be considered a burden on associational rights only if one presupposes—as did the courts below—that New York law requires prospective judicial candidates to "assemble and run a slate of delegates." *Id.* at 25. Though one determined to "influence the actual choice of a nominee," *id.* at 26, might be well-served to organize such a slate, neither Section 6-106 nor Section 6-124 (nor, for that matter, any other provision of the New York Election Law) mandates or even suggests that candidates engage in such activity.

To the contrary, New York Election Law provices that it is the *delegates* who select the judicial candidates—not *vice versa*. And certainly, one need not be a member of a slate of delegates in order "'to participate in th[at] nominating process.'" Resp. Br. 15 (quoting Pet. App. 41). Only very modest and reasonable petition requirements, *see* N.Y. Elec. L. § 6-136, (also unchallenged in this litigation) stand between

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[Footnote continued from previous page]

Assembly District]." "[e]ach party member may sign only one petition," and "petition circulators have a 37-day 'window' to gather petitions." *Id.* at 7 (citing N.Y. Elec. L. §§ 6-132, 6-134, 6-136) (emphasis added). (*iii*) "'[P]etition signatures are routinely and successfully challenged' on numerous technical grounds." *Id.* at 8 (citing N.Y. Elec. L. § 6-154). (*iv*) "[P]rospective judicial delegates 'cannot signify on the primary ballot an allegiance to a specific [supreme court] candidate.'" *Id.* at 9 (citing "rules"). (*v*) The "nominating convention must take place two weeks after the election of delegates." *Id.* (citing N.Y. Elec. L. § 6-158(5)).

any party member and candidacy within his or her assembly district for the position of delegate to the judicial district convention.

It may be the case that such a "lone gadfly" could not reasonably hope to "act as a counter-weight to the hand-picked delegate slates chosen by the county party leader." Resp. Br. 26. And it also may be true (though it seems a doubtful proposition) that "county party leaders[] . . . are the only ones capable of assembling and electing slates of delegates." *Id.* at 27. But this hardly means that Sections 6-106 and 6-124 impose severe burdens on respondents' associational rights. Neither Section 6-106 nor Section 6-124 accorded to those "county party leaders" the resources, organization, or "capab[ility]" to assemble those delegate slates, *id.* at 27; and neither statute otherwise burdens respondents' ability to run for delegate or to vote for the delegate of their choice. To the extent that respondents complain that, in the face of county leaders' superior organization, they are unable to prevail in nomination contests, they have failed to state a constitutional injury. *See Munro*, 479 U.S. at 198.

IV. Respondents Fail To Justify The District Court's Extraordinary Injunctive Relief

Respondents' brief fails to proffer any sound justification for either the district court's facial invalidation of Sections 6-106 and 6-124, or its mandate that the State hold primary elections to select party nominees for the position of supreme court justice. Even if this Court were to conclude that Sections 6-106 and 6-124 violate respondents' associational rights, the district court's extraordinary injunctive relief cannot stand.

A. Respondents assert that "[f]acial invalication is proper []here" because "[t]he record leaves no doubt that the 'statute in *all its applications* directly restricts protected First Amendment activity . . . .'" Resp. Br. 48 (quoting *Sec'y of State v. J.H. Munson Co.*, 467 U.S. 947, 967 n.13 (1984)) (emphasis added). Respondent López Torres's own experi-

ence indicates otherwise: In 2003, she attained the Working Families Party's nomination for supreme court justice from that party's *judicial district convention*. *See* Compl. ¶ 96; Tr. 2379. Unless respondents are now prepared to argue that even the nomination process in which their preferred candidate *prevailed* violated their associational rights, their own pleadings "establish . . . [a] set of circumstances . . . under which the [statutes] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Respondents otherwise make no effort whatsoever to demonstrate the substantial overbreadth necessary to support the facial invalidation of Sections 6-106 and 6-124. *See Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). Instead, in a transparent (and rather desperate) effort to evade review, respondents malign the entire inquiry as "inappropriate," suggesting—quite wrongly—that petitioners did not put facial invalidity in issue in the petition for certiorari. Resp. Br. 47 n.23. On respondents' own telling, facial invalidation of Sections 6-106 and 6-124 was a condition precedent to the district court's mandate of a primary. *See id.* at 48. The question whether Sections 6-106 and 6-124 were properly invalidated on their face thus is "'predicate to an intelligent resolution'" of the question whether the Second Circuit erred "by mandating a primary in lieu of a party convention" (Pet. for Cert. i), and, accordingly, is fairly comprised within that later inquiry. *See Ohio v. Robinette*, 519 U.S. 33, 38 (1996); *see also* Sup. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.").

Respondents can fare no better on the substance of their overbreadth claim. Their contention of *substantial* overbreadth is deeply undermined by their reliance below on a "challenger candidate" paradigm. That one can imagine "some impermissible applications of a statute"—or some class of persons to whom a statute might be unconstitutionally applied—"is not sufficient to render [the statute] suscep-

tible to an overbreadth challenge." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). To justify facial invalidation of Sections 6-106 and 6-124, respondents were required to demonstrate (and the courts below were required to find) that the impermissible applications of the statutes are "substantial" in relation to their permissible applications. *See Hicks*, 539 U.S. at 118-19. The courts below never undertook that analysis and respondents do not even attempt to do so here.

B. At no point in their brief on the merits do respondents argue that primaries are necessary to remedy the alleged injuries to their associational rights. Respondents instead defend the propriety of the district court's extraordinary affirmative relief solely on the ground that the injunction gives effect to "'the default nature of section 6-110.'" Resp. Br. 48 (quoting Pet. App. 82). That defense is legally insufficient for at least two reasons: First, it is axiomatic "that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Second, respondents suggest no reason why a federal court should ascertain in the first instance the "default nature of section 6-110" rather than the state agency charged with that state statute's administration. *See* N.Y. Elec. L. §§ 3-102, 3-104. If judicial district conventions are facially unconstitutional, it is the Board's work—not the federal courts'—to determine what, if anything, should replace them.

CONCLUSION

The decision of the court of appeals should be reversed and the injunction of the district court should be vacated.

Respectfully submitted.

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In The
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS NEW YORK COUNTY DEMOCRATIC COMMITTEE, NEW YORK REPUBLICAN STATE COMMITTEE, ASSOCIATIONS OF NEW YORK STATE SUPREME COURT JUSTICES IN THE CITY AND STATE OF NEW YORK, HONORABLE DAVID DEMAREST, J.S.C.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

I. THE POLITICAL PARTIES HAVE FIRST AMENDMENT RIGHTS IN THE CONVENTION SYSTEM WHICH PRECLUDE THE USE OF STRICT SCRUTINY IN THIS CASE 3

A. The First Amendment Associational Rights Of Political Parties Are At Stake In New York's Judicial Convention System..... 4

B. Because Party Rights Are At Stake, A Flexible Balancing Test – Not Strict Scrutiny – Should Apply To The Extent The Nominating Convention Burdens The Right To Vote 7

II. THE FIRST AMENDMENT DOES NOT GUARANTEE A RIGHT TO A PRIMARY OR A RIGHT TO WIN, BUT, AT MOST, MERELY ACCESS TO THE NOMINATING PROCESS... 8

A. The Judicial Nomination System Does Not Abridge The Purported Right Of The Party Rank-And-File To Associate With Each Other..... 9

B. The Judicial Nomination System Does Not Abridge The Purported Right Of The Party Rank-And-File To Associate With Candidates..... 13

TABLE OF CONTENTS – Continued

Page

III. RESPONDENTS' ARGUMENTS WOULD EVISCERATE *WHITE*, *COUSINS* AND *LA FOLLETTE* AND JEOPARDIZE THE CONTINUED USE OF DELEGATE-BASED NOMINATING CONVENTIONS 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

American Party of Texas v. White, 415 U.S. 767 (1974) ..... *passim*

Anderson v. Celebrezze, 460 U.S. 780 (1983) 8

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) 18

Bachur v. Democratic National Party, 836 F.2d 837 (4th Cir. 1987) 8

Buckley v. Valeo, 424 U.S. 1 (1976) 13

Bullock v. Carter, 405 U.S. 134 (1972) 9, 13, 14

California Democratic Party v. Jones, 530 U.S. 567 (2000) ..... *passim*

Clingman v. Beaver, 544 U.S. 581 (2005) 12

Cousins v. Wigoda, 419 U.S. 477 (1975) 2, 3, 10, 12

Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) ..... *passim*

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1980) ..... *passim*

LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir. 1998) 8

Lubin v. Panish, 415 U.S. 709 (1974) 9, 13, 14

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) 7

Randall v. Sorrell, 126 S.Ct. 2479 (2006) 13

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 16

Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) 8

TABLE OF AUTHORITIES – Continued

Page

Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) 17

Storer v. Brown, 415 U.S. 724 (1974) 2, 9, 13, 15

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) ..... *passim*

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 4, 16

OTHER AUTHORITIES

N.Y. Elec. L. §1-104 6

N.Y. Elec. L. §6-124 5

U.S. Const. art. II, §1 cl. 3 17

PRELIMINARY STATEMENT

Fundamentally, Respondents have a flawed vision of the First Amendment that would mandate that rank-and-file voters be given the right to vote for candidates directly at the nomination phase – a requirement that could only be satisfied with a direct primary or its functional equivalent. In light of *American Party of Texas v. White*, 415 U.S. 767 (1974), and this country's rich history of conventions which well establish that there is no constitutional right to a primary, Respondents' vision is nothing more than a policy preference best left to the State Legislature to consider.

Respondents' central complaint throughout the case has been that New York's judicial convention system is controlled by political parties and their leaders to the exclusion of rank-and-file members. Yet in their brief, Respondents suddenly wish to pretend that party conduct is not at issue so that they can justify the application of strict scrutiny to New York's convention system rather than a balancing test that takes into account the countervailing constitutional rights of the parties. Thus, Respondents argue that because the judicial nominating process is based upon a statutory framework, all conduct by the parties undertaken to effectuate the nominating process loses its First Amendment protection. But, as this Court recognized in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), even where an election is a state-run process, "when the election determines the party's nominee, it is a party affair as well." *Id.* at 573 n. 4.

In an effort to expand the scope of First Amendment rights, Respondents argued below, and the Second Circuit agreed, that the convention system severely burdens the First Amendment rights of challenger candidates within a party by depriving them of a "realistic opportunity" to vie for nominations against candidates backed by party leaders. *See* Pet. App. 41-44.[1] But as the undersigned

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[1] "Pet. App. __" refers to the Appendix to the Petition for Certiorari; "JA __" to the Second Circuit Joint Appendix; "HE __" to Volumes 1-9 of

(Continued on following page)

Petitioners detailed in their Opening Brief,[2] this standard rests on a distortion of the "reasonably diligent independent candidate" test in *Storer v. Brown*, 415 U.S. 724, 726 (1974), which applies to minor parties and independent candidates, not intraparty contests. *See* Pet. Br. at 23-27.

Faced with this argument, Respondents' brief all but abandons the effort to defend the "realistic opportunity to participate" standard which was the core thesis of the Second Circuit's decision. Instead, at this rather late stage in the case, Respondents craft a new framework in which they artificially cleave the right to associate into (i) the right of party rank-and-file to associate with one another, and (ii) the right of party rank-and-file to associate with judicial candidates. Resp. Br. at 17-18. But the very cases they rely upon, *Jones*, *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1988), actually uphold the rights of parties to dictate the terms of their own association without any requirement of direct participation on the part of the rank-and-file. In reality, Respondents claim that candidates are denied access because they rarely *succeed* in being considered by voters at the nomination stage, again revealing that Respondents will be satisfied by nothing short of direct, unmediated access between candidate and voter.

Finally, Respondents make no attempt to reconcile their flawed vision with this Court's holdings in *White*, *Cousins v. Wigoda*, 419 U.S. 477 (1975) or *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), which establish that true, delegated-mediated nomination systems such as New York's can be constitutional. When considered from the proper perspective of each participant's intended role in the process, rather than Respondents' skewed view, all of the various participants have access to the system and the burdens on the right to vote are slight. Rank-and-file voters have the unfettered

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the Second Circuit Record on Appeal; and "Tr. __" to Volume 10 of the Second Circuit Record on Appeal.

[2] Hereinafter cited as "Pet. Br. at ___."

right to vote for delegates to act as their representatives and that ability to cast a delegate ballot fully vindicates voters' First Amendment rights. *See Cousins*, 419 U.S. 477.

I. THE POLITICAL PARTIES HAVE FIRST AMENDMENT RIGHTS IN THE CONVENTION SYSTEM WHICH PRECLUDE THE USE OF STRICT SCRUTINY IN THIS CASE

After arguing to the lower courts for the past three-and-a-half years that New York's judicial convention system is unconstitutional for the very reason that it is dominated by party leaders and disadvantages "challenger candidates" who do not control the "vast party machine," Respondents now argue to this Court that this case does not involve party activity at all. Respondents' abrupt about-face is a strained effort to avoid a collision course with the First Amendment rights of political parties that are inextricably bound up in the delegate and candidate selection process. As Respondents recognize, if the First Amendment rights of political parties are implicated, then the one-sided strict scrutiny analysis the Second Circuit employed to reach its determination of unconstitutionality would not apply. *See, e.g.*, Brief for Respondents (hereinafter "Resp. Br.") at 38 ("the more relaxed level of scrutiny that might apply to a nomination process autonomously chosen by a political party with the consent of its members is simply not applicable here"). Thus, Respondents claim that "this case does not implicate the private organizational choices of a political party," *id.* at 33, but instead merely involves state-mandated action imposed on all political parties.

Respondents cannot shunt aside the independent constitutional rights of the political parties by suddenly choosing to ignore the beehive of party activity surrounding this nominating system. The judicial convention system directly involves not only party rules, which among other things determine the number of delegates required but also a broad array of classic party associational conduct

protected under the First Amendment. This conduct includes, for example, fielding delegates, circulating petitions, endorsing candidates and gathering at the convention to deliberate and select nominees. Because the parties' associational freedoms are at stake, the Court should balance the relative constitutional rights of rank-and-file voters that are allegedly infringed by the convention system against the co-equal rights of the parties that would be infringed by the mandatory installation of a primary in lieu of the convention system.

A. THE FIRST AMENDMENT ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES ARE AT STAKE IN NEW YORK'S JUDICIAL CONVENTION SYSTEM

Respondents do not deny that political parties have First Amendment rights, among them the right to organize themselves as they see fit to pursue their political goals. *See Eu*, 489 U.S. at 229 ("As we noted in *Tashjian*, a political party's 'determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution'") (citing and quoting *Tashjian*, 479 U.S. at 224); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("political parties' government, structure, and activities enjoy constitutional protection") (citation omitted). Nor do Respondents dispute the lawful right of party leaders to act on behalf of the party. *See Eu*, 489 U.S. at 229-30 (upholding right of party leaders to endorse candidates); *see also Tashjian*, 479 U.S. 208 (upholding right of party leadership to open party primary to independent voters); *La Follette*, 450 U.S. 107 (upholding right of party leadership to determine makeup of State's delegation to party national convention). Indeed, it is the simple reality of politics that party leaders organize rank-and-file members, set party goals and support candidates who best advance those goals and the interests of the party in general. *See Eu*, 489 U.S. at 230 (noting political party's "discretion in how to organize itself, conduct its affairs, and select its leaders"). Instead, what Respondents argue is that the First Amendment associational rights of political parties are simply not implicated here

because this case does not involve the autonomous choices of political parties pursuant to their own party rules, but rather conduct mandated by statute. *See* Resp. Br. at 33.

As an initial matter, Respondents have the facts wrong. This case does involve party rules. The text of the challenged statute, N.Y. Elec. L. § 6-124, expressly vests authority in the political parties to establish rules governing important aspects of the judicial nominating convention. The number of delegates to New York's judicial convention – crucial to the Second Circuit's decision – is established by party rule, not statute. *See id.*; *see also* JA 14 (Cmplt. ¶ 35) ("The Election Law grants to the political parties substantial control over the number of delegates"). Party rules also govern determination of the geographic scope of assembly districts in cases of districts comprised of all or part of two or more counties. *See* N.Y. Elec. L. § 6-124. In addition, party rules determine how party officers, county leaders and party chairpersons are chosen, their respective responsibilities, the organization of party judicial screening panels, and restrictions on whom party leaders may endorse for judicial office. *See* HE 22-30 (NYCDC Rules, Art. II & III).

Even where conduct by party leaders is not codified by a party rule, the conduct of those leaders is nonetheless party activity. *See, e.g., Eu*, 489 U.S. at 230. Respondents cite no case suggesting otherwise. Indeed, under this Court's decision in *Eu*, the aspect of the convention system that Respondents have found most objectionable – in essence, that party leaders recommend candidates to the convention delegates which the delegates typically accept – constitutes classic party activity protected by the First Amendment. *Id.* at 214; *see also* Resp. Br. at 34 (characterizing the nomination process "as a rubber stamp for a party leader"); *id.* at 38 ("the state-mandated nominating process prevents any challenges to . . . leaders' choices"); *id.* at 39 (arguing that "the State insulates the choices of party leaders"). *Eu* struck down California's statutory ban on party endorsements – the functional equivalent of recommending judicial candidates to delegates – as a violation of the associational rights of the party, without

reference to whether the party had promulgated a rule authorizing such endorsements.

In addition, Respondents wrongly assume that the mere existence of a statutory election scheme means that the conduct of parties and their leadership within its ambit is not private party activity.[3] As this Court recognized in *Jones*, even where an election is a state-run process, "when the election determines a party's nominee, *it is a party affair as well.*" 530 U.S. at 573 n. 4 (emphasis added). Party conduct within the electoral scheme is protected by the First Amendment. *See id.* at 573 ("we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution"); *Eu*, 489 U.S. at 229-33 (direct regulation of party leaders and internal party governance subject to strict scrutiny).

Prior to their Opposition Brief, Respondents themselves recognized that the operation of the convention process is rife with party conduct that is not dictated in any way by the challenged statutes. *See, e.g.*, JA 17; Respondents' Brief in Opposition to Writ of Certiorari at 2 ("This case requires us to peer inside New York State's political clubhouses and determine whether party leaders have arrogated to themselves a choice that belongs to the people") (quoting Pet. App. 5). As the district court stated, "the heart of this case is the plaintiffs' claim that county leaders, along with district leaders, decide who becomes a Justice of the Supreme Court." Pet. App. 135. The record is also replete with evidence of how local political clubs and county committee organizations field delegate candidates to run in primaries.[4] Party leaders organize the convention process, and, as the district court found, the

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[3] Indeed, parties themselves are creatures of state statute inasmuch as they must satisfy qualifying criteria to be recognized as a political party under state law. *See* N.Y. Elec. L. § 1-104(3) (defining "political party").

[4] *See* JA 1994-95; *see also* Tr. 1354:13-20 (Ward); Tr. 165:10-20 (Berger); Tr. 1557:20-1558:24 (Kellner); Tr. 1942:13-17 (Levinsohn); Tr. 1984:6-22 (Giske); Tr. 2085:8-19 (Connor).

party assembles a "package" or slate of candidates to recommend to the convention delegates.[5] *Id.* 114. All of this classic party activity is completely autonomous of the challenged statutes and, thus, merits First Amendment protection.

B. BECAUSE PARTY RIGHTS ARE AT STAKE, A FLEXIBLE BALANCING TEST – NOT STRICT SCRUTINY – SHOULD APPLY TO THE EXTENT THE NOMINATING CONVENTION BURDENS THE RIGHT TO VOTE

Because the First Amendment rights of political parties are undeniably implicated in this case, a flexible balancing test rather than strict scrutiny analysis should apply to the extent the right to vote is burdened. Respondents deride this test as "standardless." Resp. Br. at 33. This Court, however, has applied a flexible balancing approach in many cases where competing constitutional rights are implicated, including First Amendment rights in the election context. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring); *see also* Pet. Br. at 33-34 (discussing Supreme Court cases applying flexible balancing approach). And Respondents make no effort to dispute that New York's judicial convention system would easily pass constitutional muster under such a balancing test. Instead, Respondents ask this Court to indulge the fiction that the First Amendment rights of political parties are not at stake.

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[5] While Respondents portray this conduct as nefarious, it is the function of political party leaders to identify desirable candidates and rally behind them to advance the party's goals of winning elections and achieving broad support. Because there are typically multiple judicial vacancies, New York's judicial convention system affords party leaders and delegates a unique associational opportunity to engage in "logrolling" or strategic bargaining to balance slates of judicial candidates that reflect their diverse interests. *See* Tr. 2121:5-14, Tr. 2103:25-2104:25 (Connor); *see also* Tr. 1574:14-1575:4 (Kellner); JA 367-68 (Kellner Decl. ¶ 28); Tr. 1989:18-1993:16 (Giske); JA 380-81 (Ward Decl. ¶¶ 13-17); JA 348 (Levinsohn Decl. ¶¶ 23-25).

Respondents also attempt to distinguish the trio of court of appeals decisions applying a balancing test in the convention context – *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) and *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998) – on the grounds that they involved "challenges to the autonomously adopted internal rules of the national parties." Resp. Br. at 33. But Respondents' proffered distinction rings hollow. As discussed above in Section I.A, significant aspects of New York's judicial convention system are determined by party rule. Moreover, Respondents' distinction "between a system voluntarily adopted by the national political parties and one imposed by state law," *see id.* at 34, rests on isolated snippets from those cases. None of the circuit courts remotely suggested that such a distinction was relevant to their decision to apply a flexible balancing test rather than strict scrutiny.

Even the Second Circuit recognized that political parties have First Amendment rights under New York's electoral scheme, albeit under a one-sided application of the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *See* Pet. App. 71 ("under New York's scheme, parties do retain the right to select a preferred candidate and advocate on her behalf, and we agree that protecting those rights is a compelling state interest. . . .") (citation omitted). Thus, even if the burdens associated with the convention system were significant (which they are not), Respondents cannot avoid the application of the balancing test by, to use Respondents' own word, "pretending" that the First Amendment associational rights of political parties are *not* implicated by this case. *See* Resp. Br. at 18.

II. THE FIRST AMENDMENT DOES NOT GUARANTEE A RIGHT TO A PRIMARY OR A RIGHT TO WIN, BUT, AT MOST, MERELY ACCESS TO THE NOMINATING PROCESS

In their endless search for doctrinal support for their misguided vision of the First Amendment, Respondents offer a new framework for assessing the alleged burdens associated

with the convention system that divides the right to associate into (i) the right of party rank-and-file to associate with one another, and (ii) the right of party rank-and-file to associate with judicial candidates. Resp. Br. at 17-18. With respect to the right of party rank-and-file to associate with one another, Respondents argue that, under *Jones*, *Tashjian* and *Eu*, the challenged statutes infringe upon party members' right to associate with each other by "eliminating" their ability to influence the party's choice of nominee, thus, "depriving" them of a voice in the nominating process. *Id.* at 17; *see also id.* at 22. With respect to the right of party rank-and-file to associate with candidates, Respondents argue that, under *Bullock v. Carter*, 405 U.S. 134 (1972) and *Lubin v. Panish*, 415 U.S. 709 (1974), strict scrutiny applies here in light of the purported "evidence" of "exclusion" of challenger candidates from consideration by party members. *See* Resp. Br. at 29-30. Of course, the basis for Respondents' belief that challenger candidates are "excluded" from the convention is the Second Circuit's improper application of the *Storer* test. But neither of the purported lines of associational rights cases nor *Storer* remotely supports their view of the scope of the right at issue here. Ultimately, Respondents' arguments reduce to the same value judgment, *i.e.*, that rank-and-file members should have their direct, unmediated preferences fulfilled in the selection of candidates.

A. THE JUDICIAL NOMINATION SYSTEM DOES NOT ABRIDGE THE PURPORTED RIGHT OF THE PARTY RANK-AND-FILE TO ASSOCIATE WITH EACH OTHER

Relying on *Jones*, *Tashjian* and *Eu*, Respondents claim that the convention system abridges the right of party members to associate with each other because the statutes "effectively requir[e] political parties to fence out their rank-and-file members, leaving them with no voice in the parties' nomination processes." *Id.* at 22. But the party does not eliminate any members from the convention process. Instead, all rank-and-file members have a right to participate in the nominating process by electing judicial

delegates. *See Cousins*, 419 U.S. at 489 ("respondents overlook the significant fact that the suffrage was exercised at the primary election to elect delegates"). Respondents ignore the intended role of the party rank-and-file within the convention system – to elect delegates – in favor of the role Respondents wish them to have – to elect judicial candidates directly. Respondents claim that the party rank-and-file have been "fenced out" of the convention process because they fully assume their own conclusion – namely, that there is a constitutional right to a primary – and distort *Jones*, *Tashjian* and *Eu* to support it.

Arguing primarily by way of analogy to this Court's decision in *Jones*, Respondents assert that the challenged statutes eliminate the ability of party rank-and-file to influence the party's choice of nominee, and, thus, create a risk that the party will be forced "'to give their official designation to a candidate who is not preferred by a majority or even plurality of party members.'" Resp. Br. at 22 (quoting *Jones*, 530 U.S. at 579). But *Jones* only makes sense in the factual context of that case, which involved a direct primary. In *Jones*, California's blanket primary law mandated that non-members of political parties be allowed to vote in party primaries, and, thus, raised the very real danger that the nominee might not reflect the direct preferences of party members, even though the system was designed to do so. 530 U.S. at 567. *Jones* in no way supports the notion that party nominees must always reflect the direct preference of all or a majority of party members regardless of the electoral system the state has enacted.

Indeed, Respondents make no attempt to reconcile their interpretation of *Jones* with *Cousins* and *La Follette*, where this Court recognized that popular support for a candidate need not be determinative of the outcome of a nomination process. *See* Pet. Br. at 21. *Cousins* and *La Follette* are dispositive of Respondents' arguments as these cases establish that, in exercising their First Amendment rights, parties can "fence out" rank-and-file voters by choosing their own delegates and giving those delegates the right to disregard the preferences of the majority. *See Cousins*, 419 U.S. at 480 (upholding the seating of a slate

of delegates chosen at a private caucus over one popularly elected through a primary); *La Follette*, 450 U.S. at 107 (upholding the right of delegates to exercise independence and to not vote in accordance with primary results). Respondents also overlook that *Jones* explicitly refers to the holding in *La Follette* on this very point, making it clear that *Jones* cannot be read as mandating a primary where the State has adopted a convention. *See Jones*, 530 U.S. at 576; *see also id.* at 573 n. 5.

Nor does Respondents' reliance on isolated excerpts from *Eu* and *Tashjian* regarding divergence of views between political parties and their members even remotely support the conclusion that rank-and-file party members have a First Amendment right to unmediated access to voters. *See* Resp. Br. at 21-22. Respondents cite to *dicta* in *Eu* where this Court, not surprisingly, rejected the State's argument that alleged consent by political parties to the endorsement ban indicated that rank-and-file members had also consented to the ban. *See id.* at 21. Their reliance on *Eu* is, to say the least, ironic because *Eu* champions the First Amendment rights of the parties and their leadership not the rank-and-file.[6] In fact, in *Eu*, there was no concern that rank-and-file party members would be deprived of having input or any role in decisions by party leaders concerning whom to endorse.

Also surprising is Respondents' reliance on *Tashjian*, which they cite for the proposition that party members' associational rights – *separate and apart* from the associational rights of the party *qua* party – are at their "zenith" in the nomination process, and suggest that party members may not have their right to a direct say in the nomination

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[6] Respondents state that "New York vests local party leaders with power, when it serves their parochial interests, to cross-endorse candidates of rival political parties without the members' participation or consent." *Id.* at 23 (citations omitted). However, in fact, cross-endorsements are voted upon by duly elected delegates at the judicial nominating convention who serve as party representatives for the members in their assembly districts. JA 1938.

process diluted. *See id.* at 22; *see also id.* at 17. But the facts of *Tashjian* sharply undercut Respondents' argument, as the Court there upheld the right of the party leadership to enact a rule, without any ratification by party members, opening its partisan primary to independent voters. 479 U.S. at 208. In *Tashjian*, the party itself, acting through its leadership, chose to open the primary. *Id.* at 212. This action by the party leaders was upheld even though it arguably diluted the influence of rank-and-file party members in the primary. Thus, *Tashjian* confirms the rights of parties themselves.[7]

Properly read, *Jones*, *Tashjian* and *Eu* powerfully demonstrate that the First Amendment safeguards the right of association of a political party as exercised through its leadership. In each case, state statutes fell because they tread on the prerogatives of political party leadership – in *Jones*, to preserve a closed primary; in *Tashjian*, to open the party's closed primary; and in *Eu*, to endorse candidates. Here, where both the state statutes and the interests of the parties are aligned in support of New York's judicial convention system, *Jones*, *Tashjian* and *Eu* – especially when read together with *Cousins* and *La Follette* – fully support the system's constitutionality, despite the fact that party leadership choices may well diverge from those of rank-and-file members.[8]

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[7] The Court's decision in *Clingman v. Beaver*, 544 U.S. 581 (2005), in which the Court upheld a disaffiliation statute that banned political parties from opening their primaries to members of other parties, is beside the point here. *Clingman* did not deal with the right of party members to associate with *each other*, but rather the right of party members to associate with members of *another party*. *Clingman* is distinct from *Tashjian*, which involved the right of party members to associate with *independents*.

[8] Contrary to Respondents' statement that "county leaders are not elected by party members," Resp. Br. at 23 n. 5, party leaders are, in fact, elected officials who are regularly accountable to their constituents. District leaders are elected in a primary every two years by enrolled voters residing in the Assembly District. Tr. 40:16-41:14 (Berger). If rank-and-file party members are dissatisfied with a district leader's performance, they can replace that individual, which occurs frequently. *See* Tr. 2037:23-2038:5 (Allen); *see also* Tr. 1671:23-1672:8 (Kellner); Tr. 1331:16-1332:4 (Ward).

(Continued on following page)

B. THE JUDICIAL NOMINATION SYSTEM DOES NOT ABRIDGE THE PURPORTED RIGHT OF THE PARTY RANK-AND-FILE TO ASSOCIATE WITH CANDIDATES

Respondents argue that the judicial convention system imposes severe burdens on the purported First Amendment rights of party rank-and-file to associate with candidates of their choice, and, thus, requires strict scrutiny under *Bullock* and *Lubin*. But Respondents' argument is flawed because their burdens analysis rests on the unstated and erroneous premise that the Second Circuit properly extended *Storer's* reasonably diligent independent candidate test to require that challenger candidates within the party must have either (i) direct access to voters or (ii) a right to win.

Citing *Storer* without any discussion let alone defense of its application, Respondents claim that insurgent candidates are denied "access altogether," Resp. Br. at 25, when such burdens are viewed from the perspective of "whether challenger candidates have 'only rarely' succeeded in being considered by the voters," *id.* at 28 (citing *Storer*, 415 U.S. at 742).[9] Of course, whether challenger candidates have only

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County leaders are equally accountable, as they are themselves duly elected district leaders who have been selected by the other district leaders to serve in that capacity. HE 26 (NYCDC Rules, Art. III, ¶ 4(a)).

[9] Hunting for support for the Second Circuit's "challenger candidate" paradigm, *see* Pet. Br. at 28, Respondents rely on wholly inapposite cases – *Randall v. Sorrell*, 126 S.Ct. 2479 (2006) and *Buckley v. Valeo*, 424 U.S. 1 (1976) – from the campaign contribution context. *See* Resp. Br. at 28 n. 11. Those cases simply distinguished "challengers" from incumbents – a bright line to be sure. In contrast, the Second Circuit's "challenger candidate" involves the murky distinction between those candidates who are favored by party leadership and those who are not. *See* Pet. App. 59-61. Moreover, the Second Circuit's static view takes no account of the fluid realities of political campaigns where the fortunes of candidates and the support of party leaders frequently and abruptly change, particularly towards the end where astute politicians quickly jump on the bandwagon of the likely winner. As county leader Farrell described the process, "[i]t's almost like picking the winner of a horse race after the race." Tr. 1663:15-22 (Kellner); *see generally* Pet. Br. at 28

(Continued on following page)

"rarely succeeded" in being considered by voters is thinly-veiled code for whether the electoral system in question is a direct primary. *See, e.g., id.* at 28 (complaining "the statutes lock out rank-and-file members and their candidates" from the nominating process); *id.* at 26-27 (challenger candidates are excluded from the nomination process regardless of "how broad or enthusiastic their popular support") (internal quotations and citations omitted). Indeed, Respondents claim that the system imposes severe burdens because it is impossible for an individual judicial candidate to assemble and run a slate of pledged delegates. *See id.* at 25. But, again, running slates of delegates pledged to an individual candidate is the functional equivalent of giving voters a direct "voice" in choosing the nominee. *See* Pet. Br. at 29. Consequently, Respondents' argument that *Bullock* and *Lubin* require strict scrutiny is predicated on the misapplication of *Storer* as requiring a right to a direct primary. *See* Resp. Br. at 29.

Respondents nevertheless claim that, contrary to *Bullock* and *Lubin*, "Petitioners contend that the State's uniform exclusion of challengers at the nomination stage is not of constitutional dimension." *Id.* But this is a gross mischaracterization of Petitioners' position, as Petitioners agree that there is state action here. *See* Pet. Br. at 27. Under *Bullock* and *Lubin*, where there is state action, the Fourteenth Amendment prohibits exclusion of candidates based on invidious discrimination such as by wealth. No such discrimination is present here, and, without it, neither of these cases require strict scrutiny.

Nor are "challenger" candidates "excluded" from the nomination process. Properly viewed, the equivalent of ballot access in a convention context can only mean having a chance to put one's name up for consideration by the delegates at the nominating convention. But Respondents contend that, even when measured by this standard,

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and n. 14 (discussing insurgent candidates who won the nomination despite being initially opposed by party leaders).

challenger candidates do not have an opportunity to access the system because they have "no actual opportunity to lobby delegates" without party leader support. *See, e.g.*, Resp. Br. at 31 (quoting Pet. App. 18). Of course, Respondents still mean – as the Second Circuit did, again, based on its distorted application of *Storer* – that challenger candidates have no ability to successfully lobby enough delegates to *win* their party's nomination. However, as lead plaintiff Lopez Torres well demonstrates, judicial candidates do have an opportunity to lobby delegates. Indeed, Lopez Torres actually garnered substantial delegate support; she simply did not win. Tr. 612:9-615:11 (Lopez Torres).

Ironically, Respondents' focus on electoral success as the yardstick for measuring constitutionally sufficient convention access also contradicts Respondents' principal argument that this case does not involve autonomous party conduct. While Respondents acknowledge that there is no right to win, they cleverly assert that nevertheless "candidates and their supporters within a party do have a right to be free from a state-mandated process guaranteeing that they will lose." Resp. Br. at 21. But Respondents cannot have it both ways, arguing on the one hand that the statutes themselves guarantee that challenger candidates will lose, and on the other, that party leaders are responsible for convention outcomes. Similarly, even if delegates were not open to persuasion in the lobbying process, as Respondents claim, *see id.* at 31, that is not a feature of statutory design, but of party politics.

III. RESPONDENTS' ARGUMENTS WOULD EVISCERATE *WHITE*, *COUSINS* AND *LA FOLLETTE* AND JEOPARDIZE THE CONTINUED USE OF DELEGATE-BASED NOMINATING CONVENTIONS

Faced with this Court's holding in *White* that a convention can be a constitutional alternative to a primary, Respondents attack a straw man argument they wrongly attribute to Petitioners, namely, that all forms of "indirect"

democracy (*i.e.*, conventions) are *per se* constitutional. *See* Resp. Br. at 36. Actually, Petitioners make a very different point. *White* would be rendered meaningless – as would *Cousins'* and *La Follette's* vindication of delegate-mediated conventions[10] – if a convention must be equivalent to a primary in order to be constitutional; yet this is what the Second Circuit and Respondents wrongly conclude.

Respondents quote *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002), to the effect that the state must accord participants in the electoral process "the First Amendment rights that attach to their roles." *See* Resp. Br. at 35. Yet they utterly fail to address the roles actually assigned to participants in the judicial convention system. Instead, Respondents focus on the absence of a role for voters at the convention stage even though the role assigned to voters occurs earlier at the delegate primary (and later at the general election). This is, of course, how any true delegated-mediated convention operates. Respondents also assign a role to judicial candidates at the delegate selection stage that does not belong to them under the design of the system – namely, running slates of pledged delegates. *See* Pet. Br. at 29-30. Again, Respondents' fixation on pledged delegates simply reflects their desire that voters be given a direct "voice" in selection of the party's nominee. *See* Resp. Br. at 25. Assessed from the standpoint of each participants' intended role in the process, the system imposes minimal burdens and clearly passes constitutional scrutiny, as discussed in Petitioners' Opening Brief at 22-23 and 41-43.

Although Respondents claim that the decision below does not cast doubt on the continued use of conventions, under the sweep of Respondents' logic, conventions that involve candidate selection by delegates rather than voters – in other words, true conventions – would be rendered unconstitutional. *See* Resp. Br. at 44-45. Indeed, Respondents' effort to characterize New York's convention system

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[10] *See also Timmons*, 520 U.S. at 355 n. 4 (recognizing party's right to select standard bearer through means other than primary).

as an isolated anomaly as compared to all other conventions is based on meaningless distinctions. *See id.* at 44. While Respondents argue that national party conventions are not "germane" because they are "created by the parties' own rules," *id.* at 43, as discussed above, key aspects of the judicial nominating system are effectuated by parties following their own party rules. As for the four conventions allegedly distinct from New York's because they "give parties significant autonomy" in structuring their conventions, *id.* at 44, those statutes, like New York's, authorize the general framework for a convention and leave important aspects to the parties' discretion. Nor do Respondents identify any constitutionally significant differences between New York's convention and the seven conventions governing mid-term vacancies or the 17 conventions governing minor party nominations. *Id.* All of these conventions are delegate-based conventions and, certainly, they cannot be discounted by suggesting that First Amendment rights are less weighty in the context of mid-term vacancies or minor parties as opposed to major parties.[11] Lastly, Respondents' assertion that seven conventions do not relate to political office, *id.*, is simply incorrect, as these conventions nominate candidates for Electors, who cast ballots for the President and Vice-President of the United States. U.S. Const. art. II, §1 cl. 3.

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[11] Respondents rely on *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), to argue that conventions to fill vacancies are justified because the state has a "compelling interest" to fill such vacancies before the general election. Resp. Br. at 44. But *Rodriguez*, in fact, found the convention system constitutional because (i) its effect on citizens' rights to select their representatives was "minimal," 457 U.S. at 12; (ii) the State's interest in filling the vacancy without a mid-term election was "legitimate," *id.*; and (iii) the convention was "not unreasonable," *id.* at 13. In short, the convention system in *Rodriquez* satisfied rational-basis scrutiny, as would New York's judicial convention. Likewise, *White* did not suggest that States have a greater interest in imposing conventions on minor parties than major parties, *see* Resp. Br. at 44, but simply held that States may require any party to demonstrate some modicum of popular support before they may place a candidate on the general election ballot. 536 U.S. at 783.

Further, Respondents' argument that many other conventions are "structured to enhance the ability of rank-and-file party members to express their nomination preferences," Resp. Br. at 45, again, makes clear their desire to replace New York's convention system with a primary. Tellingly, Respondents offer as examples of purportedly constitutional conventions, Michigan, where *all* Democratic Party members supposedly can vote in the convention, and Alabama, which provides for primaries as a default nominating system. *See id.* at 45 n. 22. Respondents simply cannot conceive of any constitutional nominating process other than direct appointment or a primary (or its equivalent). *See id.* at 26 ("If New York believes that such a fundamental exercise in democracy adversely affects the judiciary, the answer is to opt for an appointive bench"); *id.* at 35-36 ("the greater power to dispense with elections altogether does not include the lesser power to assign roles to party members that exclude them from their own party's nomination process") (citations and quotations omitted).

Finally, Respondents do not refute that if some form of a true delegate convention must be constitutionally permissible, as *White* requires, then New York's chosen electoral system should not have been completely dismantled and replaced with a primary. Respondents' only argument in support of such a drastic remedy is that the district court did not usurp legislative authority, but merely deferred to the statutory default provision of a primary for other public offices and left open the possibility for the Legislature to enact a new statute, including the passage of a convention. *Id.* at 48-49. Not only do the statutes at issue here not contain a primary default, but Respondents entirely ignored this Court's directive in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), that the remedy should have been narrowly tailored to fit the purported constitutional defect in light of legislative intent to replace New York's failed experiment with judicial primaries with judicial conventions. Without disputing the principle that the considered judgment of a state legislature is entitled to deference,

Respondents resort to characterizing passage of the judicial nominating statutes as a surreptitious affair conducted in the dark of night. *See* Resp. Br. at 46-47. Regardless of the hour, the act of passing the legislation was no less the act of the Legislature. Respondents simply ignore all subsequent history regarding the statutes and the number of occasions spanning several decades in which the Legislature determined to preserve the convention system after serious debate. *See id.* at 47.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioners' Opening Brief, this Court should reverse the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

—v.—

MARGARITA LOPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF *AMICI*.....1

STATEMENT OF THE CASE.....3

SUMMARY OF ARGUMENT.....8

ARGUMENT.....10

I. THE DECISIONS OF THE LOWER COURTS IN THIS CASE ARE AMPLY SUPPORTED BY THIS COURT'S PRECEDENTS..... 10

II. THE CONSTITUTIONAL PROTECTION OF THE RIGHT TO VOTE AND TO ASSOCIATE IN SUPPORT OF CANDIDACIES REACHES THE RIGHT TO PARTICIPATE IN PRIMARY ELECTIONS.....18

III. THE DECISIONS OF THE LOWER COURTS DO NOT INTRUDE IMPERMISSIBLY UPON THE ASSOCIATIONAL RIGHTS OF THE PARTY LEADERSHIP.....21

CONCLUSION.....26

TABLE OF AUTHORITIES

Cases

Anderson v. Celebrezze, 460 U.S. 780 (1983).....9, 11, 13

Brentwood Academy v. Tennesse Secondary School Ass'n, 531 U.S. 288 (2001).....22

Bullock v. Carter, 405 U.S. 134 (1972)..... 11

California Democratic Party v. Jones, 530 U.S. 567 (2000).....23

Clingman v. Beaver, 544 U.S. 581 (2005).....9, 12, 22, 24

Council of Alternative Political Parties v. Hooks, 179 F.3d 64 (3rd Cir. 1999).....13

Dart v. Brown, 717 F.2d 1491 (5th Cir. 1983)..... 13

Dunn v. Blumstein, 405 U.S. 330 (1972).....11

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989).....15, 22

Kusper v. Pontikes, 414 U.S. 51 (1973).....20

Lee v. Keith, 463 F.3d 763 (7th Cir. 2006).....13

Mandel v. Bradley, 432 U.S. 173 (1977).....13

Manifold v. Blunt, 863 F.2d 1368 (8th Cir. 1988).....14

Munro v. Socialist Workers Party, 479 U.S. 189 (1986).....13

New Alliance Party v. Hand, 933 F.2d 1568 (11th Cir. 1991).....14

Perez-Guzman v. Gracia, 346 F.3d 229 (1st Cir. 2003).....13

Republican Party of Minn. v. White, 536 U.S. 765 (2002).....24

Reynolds v. Sims, 377 U.S. 533 (1964).....3, 11

Rogers v. Lodge, 458 U.S. 613 (1982) 13

Rosario v. Rockefeller, 410 U.S. 752 (1973).....20

Smith v. Allwright, 321 U.S. 649 (1944).....19, 23

Storer v. Brown, 415 U.S. 724 (1974).....9, 13

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).....24

Terry v. Adams, 345 U.S. 461 (1953).....20, 23

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).....9, 12, 22

United States v. Classic, 313 U.S. 299 (1941) 18

Williams v. Rhodes, 395 U.S. 23 (1968).....10, 12, 15

Yick Wo v. Hopkins, 118 U.S. 356 (1886).....3, 11

Statutes and Constitutional Provisions

U.S. Constitution, Art. I, § 2.....19

N.Y. Const., Art. VI, § 6(c).....3

N.Y. Elec. L. § 6-106..... 3, 22

N.Y. Elec. L. § 6-124.....3, 22, 23

N.Y. Elec. L. § 6-134(4).....22

N.Y. Elec. L. § 6-136(2)(i).....22

N.Y. Elec. L. § 6-136(3).....22

N.Y. Elec. L. § 6-158.....3

N.Y. Elec. L. § 6-160(2).....5

INTRODUCTION AND INTEREST OF AMICI[1]

This case involves a constitutional challenge to an elaborate regime governing the election of judges who seek to serve on the New York State Supreme Court, which is the State's principal trial court. This electoral system calls upon the major parties to nominate their candidates for judicial office at conventions held by each party for each of the twelve judicial districts in the State. The delegates to these conventions must, themselves, stand for election. To do so, they are required to petition their way onto a ballot and run in a primary election held a week or two prior to the conventions. The elected delegates from each party then meet at conventions and nominate the parties' candidates for judicial office. The judicial candidates nominated by the parties subsequently appear on the general election ballot. In a challenge to the constitutionality of this statutory scheme, the lower courts found that this electoral system is so complex and erects barriers to the ballot that are so formidable as to be navigable only by the party leadership that controls the machinery and resources of the major parties.

Indeed, the lower courts effectively found that despite the state constitutional requirement that judges serving on the New York State Supreme Court must be elected, the system for choosing these judges involves no real election at all. Rather, the trappings of an electoral system are deployed to create the barest illusion of an elected judiciary. In reality,

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[1] Pursuant to Rule 37.3, letters of consent from Petitioner New York County Democratic Committee and the New York State Attorney General, as a statutory intervenor in this matter, have been filed with the Clerk of the Court. All other parties have filed blanket letters of consent. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

the judges are hand-picked by the party leadership without any real electoral competition and in disregard of the state constitutional commitment to democratic processes. Judicial candidates who do not enjoy the support of the party leadership are closed out of the electoral process. Consequently, the federal District Court properly concluded that such a regime unconstitutionally denied insurgent candidates for judicial office and voters who would support these candidates a realistic opportunity to participate in an authentic electoral process. The Court of Appeals affirmed the District Court decision.

The New York State Board of Elections, the New York County Democratic Committee and the New York Republican State Committee, among others, have petitioned this Court for review of the Court of Appeals decision. In doing so, Petitioners have argued, *inter alia*, that constitutional protections accorded to the right to participate in elections (to vote, to run for office and to associate in support of candidates) do not reach New York's statutory regime challenged in this case. Petitioners further contend that the constitutional challenge mounted in this case intrudes impermissibly into the associational rights of the parties' leadership to choose their standard bearers. This Court has granted certiorari review.

This case, therefore, raises important constitutional questions regarding the scope of the constitutional right to participate in a state-mandated electoral process governing the nomination of candidates seeking elected office. The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan organization with more than 550,000 members nationwide that has long been devoted to the protection and enhancement of fundamental constitutional rights. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates and shares the ACLU's commitment to fundamental rights and liberties. The right to vote and to associate with candidates who run for office are among the most

fundamental of rights as they are "preservative of all [other] rights." (*Reynolds v. Sims*, 377 U.S. 533, 562 (1964), *citing Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). Accordingly, the ACLU and NYCLU respectfully submit this brief to address the fundamental issues raised by this case.

STATEMENT OF THE CASE

The New York State Supreme Court is the court of general and original jurisdiction throughout the State. The justices who serve on this court are the State's principal trial judges. Under New York law, these judges are elected to judicial office pursuant to an elaborate electoral scheme commonly described as the "judicial convention" system. N.Y. Const., Art. VI, § 6(c); N.Y. Elec. L. §§6-106, 124, 158.

The New York Election Law requires that each major party nominate its candidates for the office of Justice of the Supreme Court at party conventions held in and for each of the twelve judicial districts within the State. These judicial districts are quite large. Each one contains at least nine and as many as twenty-four assembly districts, the geographic districts from which members of the New York State Assembly are elected. *Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161, 172 (2nd Cir. 2006).

Delegates to each of the judicial conventions are chosen at primary elections held in September preceding the November general election. To appear on the primary election ballot, each potential delegate must, over a 37-day period, gather 500 valid signatures from party members residing in their assembly district on a designating petition to be filed at the close of the petitioning period. Each party member may sign only one designating petition.[2] New York

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[2] As the Court of Appeals noted, "because petition signatures are routinely and successfully challenged, pursuant to the one-petition signature rule, among others, each delegate slate must realistically gather

law allows the political parties to determine the number of delegates from each assembly district subject to the requirement that the delegations from the assembly districts must be "substantially" apportioned on the basis of the votes cast within each assembly district for the party's last gubernatorial nominee. *Id.* at 173.

These petitioning requirements present formidable impediments to candidates who seek judicial office without the support of the party leadership. The District Court found that "frequently as many as 6 or 7 delegates are elected from each A[ssembly] D[istrict] to attend the nominating convention for Supreme Court candidates." *Lopez Torres v. N. Y. State Bd. of Elections*, 411 F. Supp. 2d 212, 219 (E.D.N.Y. 2006). A candidate who seeks judicial office without the support of the party leadership must enlist, organize and promote slates of delegates across an entire judicial district by organizing slates from each of the constituent assembly districts. Thus, by way of example, the District Court found that "a challenger candidate for the Supreme Court in Brooklyn or Staten Island would need to gather 24,000 to 36,000 signatures drawn equally from the 24 ADs in the [judicial] district." *Id.* at 221. It noted ironically that "it is considerably easier for an aspiring [candidate] to petition ... onto the ballot for the office of Mayor of New York City (7,500 signatures – 15,000 to 22,500 as a practical matter – from anywhere in the city) than it is to petition onto the ballot slates of delegates to a judicial nominating convention." *Id.*

The burdens imposed by the petitioning process upon candidates who do not enjoy the support of the party leadership are not experienced by those in control of party resources. The District Court explained:

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between 1,000 and 1,500 signatures to gain a primary ballot position." *Lopez Torres*, 462 F.3d at 173

> [T]he petitioning process is rather easy for the major party organizations. Slates of judicial delegates are included on omnibus petitions on which signatures are obtained for other candidates seeking other offices. The county and district leaders can easily mobilize the resources necessary to conduct the petition drives throughout the judicial districts because they are collecting signatures in all of those ADs anyway, for a variety of other party and public offices. Thus, when deciding who to run for the array of offices set for election, the party leaders also decide who to run as judicial delegates and alternates.

Id.

Moreover, the burdens imposed upon insurgent candidacies are not limited to the difficulties of the petitioning process. After the petitioning process concludes, the State Board of Elections determines which Assembly Districts present contested delegate elections. As the Second Circuit observed, "[i]f only one group of delegates has filed designating petitions in an assembly district, then those delegates are 'deemed elected.' Delegates who are 'deemed elected' do not appear on the primary ballot." *Lopez Torres*, 462 F.3d at 173 (citing N.Y. Elec. Law § 6-160(2).

If, however, delegate elections are contested, names will appear on a ballot but the ballot will not identify the judicial candidate or candidates that the delegates will be supporting. Voters will not know whether the delegates are supporting the candidates of the party leadership or those opposing the party leadership. Accordingly, the current regime presents serious problems of voter education and informed decisionmaking. In this regard, the Second Circuit observed:

> ...in order to run delegate slates in any useful fashion, the judicial candidate must inform the primary electorate in each assembly district of which delegates are pledged to her in that specific locale. In the

> Second Judicial District, for example, which encompasses Brooklyn and Staten Island, a judicial candidate who ran a slate in each assembly district would have to mount 24 different voter education campaigns. In the Fourth Judicial District, which encompasses roughly one quarter of the State's land, a judicial candidate seeking to run a slate in each assembly district must conduct 10 different voter education campaigns across 11 different counties.

Id. at 173-174.

The burdens imposed upon insurgent candidacies by the delegate selection process cannot be cured simply by having those who would seek judicial office lobby the elected delegates or attend the conventions in an effort to enlist support from the delegations. There are three reasons for this. First, the conventions are held one or two weeks after the primary elections, leaving insufficient time to lobby the scores of delegates to the convention. The Second Circuit noted: "... candidates have only two weeks to lobby at least 64 delegates and as many as 248, depending on the judicial district in which they were running." *Id.* at 176. Second, as the District Court observed, "[m]ost delegates have strong ties to the district leaders who select them, and sometimes work for them as well." *Lopez Torres*, 462 F. Supp. 2d at 223. As Defendants' expert Douglas Kellner conceded: "By definition, the convention system is designed [so] that the political leadership of the party is going to designate the party's candidates. Specifically, judicial delegates are part of the party leadership and responsive to it and make it up, you know, constitute the party leadership." *Lopez Torres*, 462 F.3d at 199. Third, the judicial conventions are such "perfunctory affairs" as to be characterized by the Second Circuit as "fleeting" in their brevity. *Id* at 178. The Court below found that "[o]ver a 12-year span, conventions statewide averaged a mere 55 minutes in length. In 1996, the

Second Judicial District's convention lasted 11 minutes but yielded eight nominees." *Id.*

The final aspect of the electoral process under review involves the general elections for judicial office. One-party dominance is a common feature of such elections. Thus, the Second Circuit concluded:

> Empirical evidence showed that because one-party rule is the norm in most judicial districts, the general election is little more than ceremony. Over a 12-year period between 1990 and 2002, almost half of the State's elections for Supreme Court Justice were entirely uncontested, meaning that only one party's candidate appeared on the ballot. In certain judicial districts, contested elections verged on the non-existent. In the Sixth Judicial District, 91 percent of judicial elections were uncontested during the 12-year time span. In the First Judicial District, 85 percent of judicial elections were uncontested. In eight of the state's 12 judicial districts, more than half the elections were uncontested, which left 62 percent of the State's voters with no choice to make on the November ballot.

Id. Even in districts where one party does not necessarily predominate, the judicial elections are often not contested. As the District Court observed: "the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." *Lopez Torres*, 411 F. Supp. 2d at 231.

In sum, New York's system of electing judges to serve on its State Supreme Court can scarcely be regarded as an electoral system at all. The New York Constitution requires that such judges be elected. Yet the current statutory scheme effectively allows the party leadership to choose the candidates and, in most instances, the ultimate officeholders. It imposes serious and unwarranted obstacles upon insurgents who seek to challenge the choices of the party leaders. The

federal District Court found such a statutory regime unconstitutional in a decision rendered on January 27, 2006. By way of relief, the District Court recognized that the remedy for this unconstitutional regime must ultimately be left to the State Legislature. But the Court ordered, as an interim matter, that judicial nominations proceed by direct primary election until such time as the Legislature enacts corrective legislation. The Second Circuit, in a decision issued on August 20, 2006, affirmed the District Court decision, including the interim relief ordered by the District Judge.[3]

SUMMARY OF ARGUMENT

The State of New York is not obligated by the federal Constitution to adopt an electoral system for the nomination and ultimate election of its judicial officers. But having chosen to elect the Justices of its State Supreme Court, New York is obligated by the federal Constitution to provide for a fair and accessible electoral process. This it has not done.

The liability decision of the Court of Appeals in this case is amply supported by this Court's precedent. Three discrete doctrinal formulations fashioned by this Court to protect rights of electoral participation are potentially applicable to the statutory regime at issue in this case. All support the judgment of the courts below, which both sit in New York and are thus presumptively familiar with the challenged electoral scheme.[4]

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[3] Although *amici* support the conclusions of the District Court and the Court of Appeals that New York's statutory regime is unconstitutional, *amici* do not take a position with respect to the issue of remedy, either as a permanent matter or as a matter of interim relief.

[4] The record in this case is also voluminous. The district court hearing lasted 13 days and included 24 witnesses and 10,000 pages of documentary evidence. 462 F.3d at 172.

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court applied a sliding-scale approach, embraced by later cases, *see Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Clingman v. Beaver*, 544 U.S. 581 (2005), under which severe burdens upon rights of electoral participation trigger rigorous judicial scrutiny. The record developed in this case leaves no doubt that the statutory regime at issue imposes severe burdens upon rights of electoral participation. Applying strict scrutiny, the Court below properly found these severe burdens unnecessary to the advancement of any compelling interest.

In *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court invalidated Ohio laws that operated to freeze the political status quo and stifle electoral competition. The record adduced in this case supports a similar conclusion with respect to the statutory regime at issue here.

In *Storer v. Brown*, 415 U.S. 724, 742 (1974), this Court suggested that the constitutionality of laws that restrict candidate access to the ballot could be evaluated by asking whether, under the laws in question, "a reasonably diligent ... candidate" could secure ballot access. Under this standard, as well, the statutory regime at issue here fails. Viewed individually, each of the doctrinal approaches developed by this Court therefore supports the invalidation of New York's electoral scheme. In combination, the application of these doctrinal standards reinforces the correctness of the lower court decisions.

Petitioners incorrectly assert that the constitutional right of electoral participation does not protect the right to participate in primary elections where candidates and their supporters have access to the general election ballot. This Court has long held that the right to vote and to associate in support of candidacies embraces the right to participate in primary as well as general elections. The Court has also recognized that this right extends not only to race-based exclusions from the franchise but to other circumstances

where individuals are being effectively denied the opportunity to associate with a political party. Moreover, participating in the general election only as an "independent" candidate or as supporters of that candidate is no substitute for associating with the political party in which one is a member.

Petitioners' argument that the lower court decisions intrude impermissibly on the associational rights of the party leadership is similarly flawed. This argument ignores the fact that the constitutional challenge in this case is directed at a state-mandated scheme, not at private associational conduct. This argument also ignores the constitutional obligations that can be imposed upon political parties when they function as joint-participants with the State in the nominating process as integral components of the electoral system. In sum, New York has enacted an electoral system for the nomination of candidates for judicial office. As such, that system is subject to constitutional constraints.

ARGUMENT

I. THE DECISIONS OF THE LOWER COURTS IN THIS CASE ARE AMPLY SUPPORTED BY THIS COURT'S PRECEDENT

This Court has long recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation." *Bullock v. Carter*, 405 U.S. 134, 143 (1972). It has noted that "laws that affect candidates always have at least some theoretical ... effect on voters." *Id.* It has observed that laws that restrict access by candidates to the ballot burden "two different, although overlapping" aspects of the right to vote: first, "the right of individuals to associate for the advancement of political beliefs"; and second, "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). "Both of these rights,"

the Court has remarked, "rank among our most precious freedoms." *Id.* Both of these rights are implicated by the current controversy.

Recognizing these "most precious freedoms" as "preservative of all [other] rights," *Reynolds v. Sims*, 377 U.S. at 562, citing *Yick Wo*, 118 U.S. at 370, the Court has, over time, developed and applied a variety of doctrinal standards and principles designed to protect the rights of electoral participation -- to vote, to run for office and to associate in support of candidates. The broadest and most encompassing doctrinal formulation was that offered by the Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *Anderson* involved a constitutional challenge to an early filing deadline imposed upon independent candidates seeking the presidency. In evaluating this challenge, the Court urged a careful sifting of the facts and of the competing interests at stake. It announced that a reviewing court

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which these interests make it necessary to burden the plaintiff's rights. Only after weighing all the factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789.

Applying this approach, the *Anderson* Court concluded that Ohio's filing deadline imposed a substantial burden on the rights of voters and candidates. Then, citing to *Dunn v. Blumstein*, 405 U.S. 330 (1972), a case in which this Court applied strict judicial scrutiny to invalidate

Tennessee's durational residency requirement for voting, the *Anderson* Court closely scrutinized the Ohio enactment. 460 U.S. at 806. Finding that the State's interests could be satisfied in "a less drastic way," the *Anderson* Court invalidated the Ohio law. *Id.*

In essence, the *Anderson* Court suggested a sliding-scale approach in which more severe burdens on electoral participation would trigger more intensive judicial scrutiny. Later cases have expressly articulated and applied such an approach. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Clingman v. Beaver*, 544 U.S. 581 (2005). Thus, in *Clingman* this Court announced that "[r]egulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling interest. [Citing *Timmons*, 520 U.S. at 358]. However, when regulations impose lesser burdens, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Clingman*, 544 U.S. at 586-587.

In *Williams v. Rhodes*, 393 U.S. 23, the Court articulated and applied a somewhat different principle in reviewing Ohio's statutory framework governing access to the ballot by independent parties. *Williams* involved "a series of election laws" adopted in Ohio that "made it virtually impossible for a new political party ... to be placed on the state ballot" even "though it [had] hundreds of thousands of members ...." *Williams*, 393 U.S. at 24.

In reviewing this statutory scheme, this Court observed that "the Ohio system does not merely favor a 'two-party system'; it favors two particular parties – the Republicans and the Democrats – and in effect tends to give them a complete monopoly." *Williams*, 393 U.S. at 32. Noting that "[c]ompetition in ideas and governmental policies is at the core of our electoral process ...", *id.*, the Court invalidated the Ohio system upon the ground that it

severely limited electoral competition and simply protected the political status quo.

In *Storer v. Brown*, 415 U.S. 724 (1974), this Court suggested yet a third approach. At issue in *Storer* was a California statute that, *inter alia*, imposed petitioning requirements on candidates seeking access to the ballot. In reviewing the statute, this Court inquired as to whether "a reasonably diligent ... candidate [could] be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Storer*, 415 U.S. at 742. The Court explained that this inquiry requires a careful examination of political realities. It noted: "Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not." *Id.* In *Storer*, this Court remanded the portion of the case that concerned the petitioning requirements for the lower courts to consider the impact of such requirements on "a reasonably diligent ... candidate." *Id.* at 738, 742.[5]

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[5] The "reasonably diligent ... candidate" standard has not been frequently invoked by this Court. Subsequent to its articulation in *Storer*, it was adopted in a *per curiam* opinion of this Court in *Mandel v. Bradley*, 432 U.S. 173, 177-178 (1977). It was also discussed in three dissenting opinions, *Rogers v. Lodge*, 458 U.S. 613, 636 n.10 (1982) (Stevens, J., dissenting) (endorsing *Storer's* "objective" approach to evaluating the constitutionality of an election regime); *Anderson v. Celebrezze*, 460 U.S. 780, 809-10 (1983) (Rehnquist, J., dissenting) (disputing difficulty of ballot access for independent candidates in Ohio); *Munro v. Socialist Workers Party*, 479 U.S. 189, 205 (1986) (Marshall, J., dissenting) (citing *Storer*) (emphasizing that "the validity of ballot access limitations is a function of empirical evidence"). Although infrequently invoked, the "reasonably diligent candidate" standard has never been repudiated by this Court. And every Circuit Court, including the Second Circuit in *Lopez Torres*, 462 F.3d at 195, that has addressed this standard continues to treat it as good law. *E.g., Perez-Guzman v. Gracia*, 346 F.3d 229, 242 (1st Cir. 2003); *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 77 (3rd Cir. 1999) (Alito, J.); *Dart v. Brown*, 717 F.2d 1491, 1503 & n.25 (5th Cir. 1983); *Lee v. Keith*, 463 F.3d 763, 769 (7th Cir.

The application of any of these doctrinal approaches toward the statutory scheme at issue here strongly supports the judgment reached by the court below. The District Court, in this case, developed an extensive factual record and both the District Court and the Court of Appeals engaged in a careful sifting of the facts and weighing of the interests as required by the sliding-scale approach of *Anderson* and its progeny. In doing so, the lower courts properly found that New York's statutory scheme imposed severe burdens upon the rights of voters and candidates. *Lopez Torres*, 462 F.3d at 195. The burdensome petitioning requirements, the difficulties of recruiting delegates to participate in the process and the futility of trying to persuade the delegates chosen by the party leadership to vote against the candidates preferred by the leadership led the Court of Appeals to conclude, in affirming the District Court, that "it is 'virtually impossible' – and perhaps absolutely impossible" for an insurgent candidate to run against the party leadership and secure the nomination of the party. *Id.* at 197. Given the severity of the burdens imposed upon insurgent candidates by the New York statutory framework, the Court of Appeals properly concluded that the state's proffered justifications could not survive heightened scrutiny under the *Anderson-Clingman* line of cases.

Specifically, defendants advanced six justifications in support of the current regime in the courts below: (1) "protecting a political party's associational right to choose its own nominee"; (2) "preventing party raiding"; (3) "promoting geographic diversity and balance on its party ticket"; (4) "promoting racial and ethnic diversity on the bench"; (5) "promoting geographic diversity on the bench"; and (6) "promoting judicial independence by protecting judicial candidates from the 'ill effects of political campaigning.'" *Id.* at 201.

2006); *Manifold v. Blunt*, 863 F.2d 1368, 1374 (8th Cir. 1988); *New Alliance Party v. Hand*, 933 F.2d 1568, 1573 (11th Cir. 1991).

The Court of Appeals correctly found that each of these justifications was insufficient to justify the burdens imposed by New York's judicial election scheme. As a preliminary matter, the court observed that the parties' associational rights do not permit it "to exclude its own members from the nominating" process. *Id.* The court further found that a party's associational interests could be more narrowly pursued by simply promoting its own candidates with supporting informational literature rather than by excluding insurgents from the process. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). And, the court found that the concern for inter-party raiding, if truly a concern, could be more narrowly addressed by enacting a "one-year affiliation" requirement. *Id.* at 202.

In response to concerns for geographic and racial diversity, the Court of Appeals examined empirical data and properly concluded that those interests did not appear to be well-served by the current system. But, even "[s]etting these empirical doubts to one side," the Court of Appeals identified the creation of judicial districts "that more closely reflect some combination of geographic and racial constituencies" as a less restrictive alternative. *Id.* at 203. In a similar vein, the Court offered a number of alternatives that would advance the asserted interest in judicial independence in a more narrowly tailored fashion than the existing electoral scheme, including public financing for judicial candidates. *Id.* at 204. In sum, the decision of the courts below is fully consistent with the *Anderson-Clingman* standard.

The decision below is also supported by the principles articulated by this Court in *Williams v. Rhodes*. The record in this case fully supports the conclusion that the current regime is designed to insulate the party leadership and its chosen judicial candidates from serious challenge. It thus operates "to freeze the political status quo," *Lopez Torres*, 411 F. Supp. 2d at 255, and to impede the vigorous

"[c]ompetition in ideas and governmental policies" which lie "at the core" of our electoral system. *Williams*, 393 U.S. at 32. Numerous reports and studies considered by the courts below support the observation that the current system simply reinforces the power of the party leadership and effectively prevents intra-party competition in ways that reinforce the political status quo. For example, in 2003, New York State's Chief Judge created a Commission to Promote Public Confidence in Judicial Elections. After conducting a thorough study of the nominating process statewide, the Commission concluded: "[T]he uncontested evidence ... is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders ... and in many parts of the state, being on the dominant party's slate is tantamount to winning the election." *Lopez Torres*, 462 F.3d at 181. The Fund for Modern Courts arrived at a similar conclusion: "Political leaders, not voters, control judicial conventions and decide who will receive the nomination – and thus who will be the judge." *Id.* And a Task Force on Judicial Diversity appointed by former Governor Mario Cuomo agreed: "In practice it is the political party leaders who have the decisive power to determine who will be nominated. Most often this nomination is tantamount to election." *Id.*

Finally, New York's judicial convention system cannot be sustained under the "reasonably diligent ... candidate" test articulated by the *Storer* Court. The experiences of Lopez Torres in her efforts to secure access to the ballot vividly illustrate the obstacles confronting an insurgent candidate. Lopez Torres had substantial popular support in the community; and she was deemed "highly qualified" by party officials. *Id.* at 181. Nevertheless, she could not secure a party nomination, despite her diligent efforts, because she had rebuffed her party's county leader in refusing to hire a clerk whom he had referred to her. *Id.* at 178-181.

Statistics recited by the Court of Appeals reinforce the conclusion that candidates for judicial office in New York are effectively chosen by the party leadership, and that candidates who do not enjoy support of the leadership do not gain access to the party ticket no matter how diligent they may be. The Court of Appeals found that "over a four-year period, almost 90 percent of all delegate races in four judicial districts - including what is perhaps the State's most competitive district - went uncontested, meaning that nearly 9 out of 10 delegates were 'deemed elected' without ever appearing on the ballot. In four counties – Albany, Nassau, Suffolk, and Tompkins – there was not one single contested delegate race." *Id.* at 197-198. "These statistics," according to the Court of Appeals, "starkly illustrate that the structure of the primary election and the petition signature regulations are 'patently exclusionary' with respect to candidates and ultimately voters, who hardly ever receive the opportunity to cast a vote in a delegate race." *Id.* at 198.

In sum, the decisions of the courts below are amply supported by this Court's precedent. Under each of the doctrinal approaches developed by this Court to protect rights of electoral participation, the record adduced in this case supports the invalidation of New York's statutory regime. In combination, the application of these doctrinal standards to the New York system reinforces the correctness of the lower courts' decisions.

II. THE CONSTITUTIONAL PROTECTION OF THE RIGHT TO VOTE AND TO ASSOCIATE IN SUPPORT OF CANDIDACIES REACHES THE RIGHT TO PARTICIPATE IN PRIMARY ELECTIONS

In defense of the current statutory regime, Petitioners argue that the constitutional protection accorded to rights of electoral participation (to vote, to run for office and to associate in support of candidates) does not extend to primary elections, and thus does not assure meaningful participation in a party's nomination process so long as the candidates have reasonable access to the general election ballot. Br. of Pet. State Board of Elections at 15-25. This argument is flawed for several reasons.

First, this Court has long held that the constitutional right to vote embraces the right to vote in a primary as well as in a general election. This was precisely the issue addressed by the Supreme Court in *United States v. Classic*, 313 U.S. 299 (1941). *Classic* involved a criminal prosecution of individuals for fraudulent practices in connection with a primary election for Congress. The prosecution rested upon a statute that made it a crime to conspire to deprive citizens of "the free exercise and enjoyment of rights and privileges secured to them by the Constitution ...." *Classic*, 313 U.S. at 308. The issue before the Court was whether the right to vote in a primary election and the right to run as a candidate in a primary election were rights secured by the federal Constitution.

In addressing the right to vote in primary elections in that case, the *Classic* Court observed:

> That the free choice by the people of representatives in Congress ... was one of the

> great purposes of our constitutional scheme of government cannot be doubted. We cannot regard it as any less the constitutional purpose, or its words as any the less guaranteeing the integrity of that choice, when a state, exercising its privilege ... changes the mode of choice from a single step, a general election, to two, of which the first is the choice at a primary of those candidates from whom, as a second step, the representative in Congress is to be chosen at the election.

Id. at 316-317. Based on that observation, this Court concluded that "[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2" of the federal Constitution. *Id.* at 318.

Concededly, the constitutional provision at issue in *Classic* was Article I, § 2, pertaining to the election of members of Congress. But this Court has subsequently made clear that the constitutional right to participate in electoral processes, whether grounded in the Fourteenth or Fifteenth Amendments or whether resting upon the First Amendment, extends to primary elections as well as to general elections.

In *Smith v. Allwright*, 321 U.S. 649 (1944), this Court reviewed the refusal to permit a black citizen to vote in a state-mandated primary election of the Texas Democratic Party. In holding that this refusal violated the Fifteenth Amendment, this Court announced: "It may now be taken as a postulate that the right to vote in ... a primary for the nomination of candidates without discrimination by the State, like

the right to vote in a general election, is a right secured by the Constitution." *Smith*, 321 U.S. at 661-662. In *Terry v. Adams*, 345 U.S. 461 (1953), this Court extended its holding in *Smith* to a nomination process administered by what purported to be a private political association, the Jaybird Association, where the private association had been created in a transparent effort to avoid the reach of the Court's decision in *Smith*.

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *Kusper v. Pontikes*, 414 U.S. 51 (1973), this Court addressed the right to vote in primary elections where state laws imposed "waiting periods" for those who wished to vote. *Rosario* involved a requirement that a prospective primary voter must enroll with the party between eight and eleven months prior to the election. This restriction was challenged as a violation of the Fourteenth Amendment protection of the "equal right to vote" and as a violation of the First Amendment right of political association. The *Rosario* Court narrowly upheld the restriction. But, in *Kusper*, the Court invalidated a twenty-three month waiting period for voting in a primary election, concluding that such a restriction imposed a severe burden "upon the right of free political association protected by the First and Fourteenth Amendments." *Kusper*, 414 U.S. at 61.

As a general proposition, therefore, the right to vote in a primary election and to associate in support of candidates in such an election is entitled to well-settled constitutional protection. Moreover, access to the general election ballot, as urged by Petitioners, is no substitute for the rights asserted by plaintiffs in this case. For a member of a major party, the opportunity to petition one's way onto the general election ballot as an "independent" is not the

equivalent of securing the nomination of one's own political party. This is so for two reasons. First, running as an "independent" ignores entirely the First Amendment interest in associating with the political party in which one is a member. Second, as the record in this case makes clear, running as the nominee of a major political party matters significantly when it comes to one's likelihood of prevailing in the general election.

III. THE DECISIONS OF THE LOWER COURTS DO NOT INTRUDE IMPERMISSIBLY UPON THE ASSOCIATIONAL RIGHTS OF THE PARTY LEADERSHIP

In further defense of the current regime, Petitioners assert that the decisions of the lower courts intrude impermissibly upon the associational rights of the party leadership to choose the party's candidates. Pet. State Bd. of Elections Br. at 26-29. Petitioners' argument, in this regard, is conceptually flawed in two important ways. First, it ignores the dual constitutional status of political parties. Second, it seems to rest upon the faulty premise that the rules governing the nomination process at issue in this case were fashioned by the parties, and that plaintiffs' constitutional challenge is directed at internal party rules rather than at state-mandated procedures.

Parties are, in many respects, voluntary political associations and, as such, they are entitled, in most circumstances, to protection by the First Amendment from regulatory intrusion. Such constitutional protection is greatest when a party engages in matters of internal governance, when it develops its policy positions and platforms and when it communicates its policy positions to the public.

Timmons, 520 U.S. at 363; *Clingman*, 544 U.S. at 589-590. *See also Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) (holding that limitations on endorsements and restrictions on matters of internal governance violate the associational rights of parties). But, in other narrow circumstances, political parties are so inextricably intertwined in the State's electoral process as to be viewed as joint-participants with the State in the administration of the elections.[6] As discussed in connection with *Smith v. Allwright*, *supra* and *Terry v. Adams*, *supra*, such joint participation occurs particularly when parties are engaged in administering the nomination process along with the State. Under such circumstances, the lesson of *Smith* and *Terry* is that the parties are treated, not as autonomous associational entities, but as "state actors" and as such, are subject to constitutional constraints.

Those are the circumstances presented here. The State of New York has prescribed the electoral procedures by which the parties choose their nominees and this suit is directed at those procedures. The State imposes the requirement of a convention. N.Y. Elec. L §§ 6-106, -124. It requires that delegates to that convention be elected. *Id.* at § 6-124. It mandates that to run for election to the convention delegates must circulate designating petitions and further prescribes the numbers of signatures that must be gathered and the time allotted for gathering the signatures. *Id.* at §§ 6-134(4), 136(2)(i), 136(3). It requires that delegates must

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[6] *Cf. Brentwood Academy v. Tennessee Secondary School Ass'n*, 531 U.S. 288, 302 (2001)("Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.").

gather signatures and run from their own Assembly Districts even though the convention will nominate candidates for judicial office to run, on an at-large basis, from the entire Judicial District. *Id.* at § 6-124.

Although these election procedures clearly implicate the parties as participants in the election process, the parties have been given only a minor role in fashioning the electoral procedures used in New York to select judges. New York's Election Law permits the parties to determine how many delegates will represent each Assembly District at the judicial nominating convention, *id.*, but this limited and state-conferred authority does not turn the convention process into a private arrangement. It does not immunize the state-mandated procedures from meaningful constitutional review. And, such review cannot be regarded as an impermissible intrusion into the associational autonomy of the political parties, any more than the review undertaken by this Court in *Smith* and *Terry*.

Indeed, this case involves less autonomous conduct by the political parties than *Terry*. This is not a case where the political parties, on their own, have devised internal procedures for nominating candidates that are then subject to challenge. This is not a case where the State of New York has decided that rank and file party members should have no say in the nomination of party candidates and that the party leadership should choose the nominees without an election. This is not a case where the State has chosen to define the composition of the electorate that might vote in a primary election but has done so in a way that displeases the political parties. *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (California's decision to open party primaries to all voters held to violate parties' associational rights);

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (Connecticut's refusal to permit party to allow "independents" to vote in party primary held to violate party's right to define its associational boundaries); *see also Clingman v. Beaver, supra* (Oklahoma's refusal to permit parties to open their primary elections to all registered voters held not to violate the First Amendment).

This is a case where the State Legislature has enacted a statutory scheme designed to give party members an electoral voice in the judicial selection process by choosing delegates in a state-run election who later meet in convention to nominate the party's candidates for judicial office. As Justice Kennedy observed in another judicial election case: "The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech." *Republican Party of Minn. v. White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring). Likewise, in this case, New York cannot opt for an elected judiciary and then deprive voters of a meaningful opportunity to participate in real electoral contests upon the ground that genuine contests would interfere with the autonomy of party leaders to choose the party nominees and the ultimate officeholders.

It is one thing to say that political parties have an associational right protected by the First Amendment to determine who votes in a primary election to choose the party's nominee. Once having decided who is eligible to participate in the nominating process, however, it is a very different proposition to argue that political parties have a First Amendment right to enlist the state's support in running an unfair election. This case involves the latter situation, not the former.

New York can adopt an electoral system, as it has done. Or it can adopt an appointive system. It cannot purport to do both at the same time.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that this Court affirm the decision of the Court of Appeals.

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No. 06-766

In The
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER, CAROL BERMAN, HELEN MOSES DONOHUE, and EVELYN J. AQUILA, in their official capacities as Commissioners of the New York State Board of Elections, New York County Democratic Committee, New York Republican State Committee, Associations of the New York State Supreme Court Justices in the City and State of New York, and JUSTICE DAVID DEMAREST, individually, and as President of the State Association, ELIOT SPITZER, Attorney General of the State of New York,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER, Common Cause/NY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTERESTS OF *AMICUS CURIAE* ... 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. The Lower Courts Failed To Properly Apply *Ayotte* Because They Applied Overly Broad Findings Of Fact To Justify An Overly Broad Remedy 6

A. The Courts Below Failed To Properly Apply *Ayotte* Because Of Their Misreading Of The New York State Election Law 9

B. The Rulings of the Courts Below Sweep Too Broadly, Exposing Other Conventions And Screening Panels To Standardless Judicial Scrutiny 11

C. The Remedy Imposed By The Courts Below Was Geographically Overly Broad..... 17

D. The Courts Below Should Have Taken Into Account The Impact A Partisan Open Primary Would Have On Racial Diversity..... 18

II. A Partisan Open Primary Election System Will Likely Disadvantage Asian Americans Because Voting Will Tend To Take Place Along Ethnic Lines 20

III. District-Wide Judicial Elections In New York State Would Be Prohibitively Expensive 24

TABLE OF CONTENTS – Continued

Page

IV. The Lower Courts Erred By Permitting The Enactment Of New State Action In The Form Of Open Primaries After Striking New York's Judicial Convention Statutes In Their Entirety 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

American Party of Texas v. White, 415 U.S. 767 (1974) 2, 3, 12

Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) ..... *passim*

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 7

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Butts v. City of New York, 614 F. Supp. 1527 (E.D.N.Y. 1985) 20

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Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 11

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Lilly v. Virginia, 527 U.S. 116 (1999) 12

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Regan v. Time, Inc., 468 U.S. 641 (1984) 8

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TABLE OF AUTHORITIES – Continued

Page

Tasini v. New York Times Co., 184 F. Supp. 2d 350 (S.D.N.Y. 2002) 13

Terry v. Adams, 345 U.S. 461 (1953) 11

United States v. Booker, 543 U.S. 220 (2005) 7, 29

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Whitcomb v. Chavis, 403 U.S. 124 (1971) 7

STATUTES

N.Y. Constitution, Article VI, § 6[c] 10

N.Y. Constitution, Article VI, § 7[a] 24

New York Election Law § 6-106 ..... 4, 10

New York Election Law § 6-110 ..... 4, 10

New York Election Law § 6-124 4

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TABLE OF AUTHORITIES – Continued

Page

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Page

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The Green Papers, Election 2000-2004 Glossary http://www.thegreenpapers.com/Definitions.html 16

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What Chance of a Superdelegate Showdown at the Dem Convention, The Hill (November 5, 2003) 15

STATEMENT OF INTERESTS[1]

Amicus Curiae Asian American Bar Association of New York ("AABANY") is a membership organization which represents the interests of approximately 4,000 Asian American attorneys in New York. Since its incorporation in 1989, AABANY has taken an active role in advocating and promoting diversity in the judiciary and has taken positions on legal issues that affect the access of Asian Americans and other minorities to the electoral process.

AABANY filed briefs *amicus curiae* in this Court supporting petitioner's application for a writ of certiorari and in the Second Circuit seeking reversal of the district court decision on the grounds that the district court failed to narrowly tailor its injunctive relief to fit the purported constitutional infirmities set forth in its preliminary injunction decision. Because of the direct and negative impact that the remedy of judicial district-wide open primaries will have on Asian Americans, from both an ethnic diversity and an associational rights perspective, AABANY is in a unique position to aid this Court in understanding the issues presented by the petition, particularly with regard to the district court's improper remedy, which is a subsumed component of the first question presented by petitioners in the petition for a writ of certiorari.

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, the *amicus curiae* discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This Court has previously held that "[i]t is too plain for argument . . . that the State may properly limit each political party to one candidate for each office on the ballot and may insist that intra party competition be settled before the general election by primary election or by party convention." *American Party of Texas v. White*, 415 U.S. 767 (1974), citing, *Storer v. Brown*, 415 U.S. 724, 733-736 (1974). New York State has chosen to have intra-party competition between candidates for its court of general jurisdiction, the New York State Supreme Court, settled in party conventions. Yet, by judicial fiat, the district court jettisoned New York's convention system in favor of the very system New York State intentionally chose *not* to adopt with regard to this office – open primaries. With the stroke of a pen, the state judiciary is now burdened with the prospect of expensive campaigns for electoral office. In doing so, the courts below eviscerated the aspirations of Asian Americans to "meaningfully participate" in their own efforts to seek judicial office because Asian American candidates cannot raise the necessary funds or overcome ethnic bloc voting that is stacked against small minority groups all in the name of amorphously named so-called challenger candidates that by definition lacks support.

Remarkably, the courts below imposed this remedy on the basis of no fact-finding whatsoever. Rather, the courts below imposed an open primary system as a "default" and "interim" remedy, and in the process, swept aside New York's 90 year old convention system.

The courts below imposed this remedy even though the record contains little or no showing that the system is *structurally* deficient. And even if such structural

deficiencies had been shown, the courts below should have mended, not ended, the system. As this Court instructed in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), injunctive relief must be narrowly tailored to address the constitutional infirmities in question.

The Second Circuit made clear that its standard applied even to "facially valid" convention systems. Petitioners' Appendix at 41 (hereinafter "Pet. App. ___."). As such, the rulings of the courts below amount to a frontal challenge to *American Party of Texas*. In contravention of *American Party of Texas*, the courts below legislated a requirement that the public be afforded direct and unmediated access to New York's judicial nomination process. The standard set by the courts below would expose a variety of existing nomination systems to the possibility of standardless judicial review. For example, the standard set by the courts below could put at risk such systems as the major parties' nomination process for presidential candidates, a process in which party leaders wield considerable and potentially decisive influence. And, taken to its logical conclusion, the rulings of the courts below raise the spectre that successful state-run screening panels would have to open their doors to the electorate if those screening panels serve as meaningful gatekeepers to judicial nominations. These results, which are antithetical to *American Party of Texas*, cannot stand.

SUMMARY OF ARGUMENT

The court of appeals and district court refused to correctly apply *Ayotte* and directed open primaries as an

"interim" remedy based upon a non-existent primary "default" provision supposedly contained in New York's election law.[2] Pet. App. 82 (discussing the purported "default" nature of Election Law § 6-110); *id.* at 23 (noting that the district court enjoined conventions "[b]ased upon the provision of state election law providing for primary elections as the default nominating process. . . . ").

Yet, New York's election law contains no such "default" provision to open primaries for the office of New York State Supreme Court Justice. Rather, Election Law § 6-110 specifically states that a primary election be used "*except as provided herein.*" Election Law § 6-106, in turn, expressly provides that nominations for Supreme Court Justice will be by party convention. Thus, rather than providing for an open primary "default," Election Law § 6-106 actually embodies the legislature's intention to have nominations for this elective office conducted by convention.

Based upon this mistaken reliance upon a non-existent default provision, the courts below imposed an open primary remedy with no fact-finding on the remedy issue. Such fact-finding would have disclosed that the "default" remedy is not warranted.

First, because the record discloses no structural infirmity with the convention system, fact-finding may have revealed that the system could have been improved through more narrowly tailored remedies such as revision of signature requirements, timing, and the number of delegates at conventions.

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[2] The courts below struck down Election Law §§ 6-106 and § 6-124 as unconstitutional. Election Law § 6-106 pertains to party nominations for justices of the New York State Supreme Court. Election Law § 6-124 contains the statutory procedures for judicial conventions. Pet. App. 186.

Second, because of its suspect fact-finding, the courts below relied principally on the thesis that the convention system was flawed because party leaders tend to strongly influence the results. If this were the standard, it would call into question many convention systems, including those of the major national political parties.

Third, because the record focused, at most, on two judicial districts, the remedy ordered by the courts below should not have encompassed the entire state, but should, at most, have been confined to the two judicial districts that were the subject of the courts' fact-finding.

Fourth, the courts below should have taken into account the impact that open primary elections would have on the aspirations of minority candidates seeking judicial office. If the courts below had engaged in proper fact-finding, they would have taken into account the fact that a remedy of judicial district-wide partisan open primary elections has the grave potential of leading to a "tyranny of the majority" to the detriment of Asian Americans, one of the least powerful and most underrepresented ethnic minorities in New York State. The existing nominating system, whatever its flaws, does not present Asian Americans with the same barriers that they may face in a partisan open primary election process. The latter process is one in which voting along ethnic lines would most likely prevail to the detriment of minority groups such as Asian Americans. Indeed, a partisan electoral process is one in which cash is king – again an insuperable barrier to the aspirations of many Asian Americans who generally lack the resources and the political clout to raise the hundreds of thousands of dollars, if not millions of dollars, needed for judicial races in New York.

As a result of the demographic and fiscal challenges posed by a partisan open primary election system, Asian Americans have been virtually shut out of judgeships in the states where such systems prevail. Eight states, encompassing approximately 25% of the nation's population, have partisan election systems similar to the system that the courts below have imposed.[3] From the point of view of Asian Americans, the experiences of these eight states are striking: out of nearly 2,500 judges in those eight states, only *seven judges* are of Asian American descent.[4] A majority of the states with partisan open primary election systems have *no Asian American judges* whatsoever.[5]

ARGUMENT

I. The Courts Below Failed To Properly Apply *Ayotte* Because They Applied Overly Broad Findings Of Fact To Justify An Overly Broad Remedy

Although the Second Circuit acknowledged that "a convention-based system is, in the abstract, a perfectly acceptable method of nomination," Pet. App. 46, it

[3] Peter D. Webster, *Selection and Retention of Judges: Is There One Best Method?*, 23 Fla. St. U. L. Rev. 1, n80 (Summer 1995). The states with partisan election systems are Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas, and West Virginia.

[4] American Bar Association, National Database on Diversity in the State Judiciary, http://www.abanet.org/judind/diversity/national.html#1. The ABA analyzed authorized judgeships in the states for the general jurisdiction appellate and trial court bench.

[5] Webster, *supra*, n81. The states are Alabama, Arkansas, Mississippi, North Carolina, and West Virginia.

nonetheless struck down New York's convention system in its entirety with no explanation as to why the system was *structurally* flawed. At its core, the courts below struck down New York's system because that system tended to produce nominees supported by party leaders. However, as set forth below, such an indictment could be directed at many political convention systems and, as such, this is not an argument that goes to the structure of the New York system. Accordingly, this finding does not justify the remedy of striking down the entire system.

The courts below failed to heed this Court's direction that federal courts should not "nullify more of the legislature's work than is necessary." *Ayotte,* 546 U.S. 320, 326. As this Court instructed, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Ayotte*, 546 U.S. 320, 329 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). Indeed, this Court has provided a clear admonition in the election law context that judicial remedies be narrowly tailored to avoid "reject[ing] state policy choices more than was necessary to meet the constitutional violations involved." *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971)). Thus, in cases such as *United States v. Booker*, 543 U.S. 220 (2005), the Court took great pains to sever and excise only those portions of Title 18 of the United States Code that rendered the Sentencing Guidelines unconstitutional, while scrupulously leaving in place the applicability of the Guidelines to the federal sentencing scheme. Similarly, the courts

below should have used a like surgical technique by only excising any allegedly offending provision.[6]

In *Ayotte*, this Court explained that several interrelated principles support this limitation on judicial remedies.

> "[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.' *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) . . .
>
> Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). . . .
>
> Third, the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' *Califano v. Wescott*, 443 U.S. 76, 95 (1979)."

See supra, 546 U.S. 320 at 329 (certain citations omitted).

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[6] *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976) (in order to save the statute from First Amendment infirmity, the Court engaged in an extensive re-interpretation of the statute, construing the statute as imposing independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate).

The Second Circuit rationalized that the application of a less intrusive alternative to salvage judicial conventions from the purported constitutional defects would have been "inviting the District Court to act as a one-person legislature superchamber." Pet. App. 80. However, in what is purportedly an "interim" remedy, but in reality amounts to the imposition of a permanent injunction, the district court had no qualms in reducing the number of signatures required by Election Law § 6-136 which would apply to the open primaries. Pet. App. 184. Thus, the rulings of the courts below are internally inconsistent. If it is permissible to amend the signature requirement, it should be equally permissible to "fix" other aspects of the convention system, rather than scrapping it altogether.

If the Second Circuit had considered the various factors, it may have attempted to remedy the supposed constitutional infirmities by such carefully tailored remedies as ordering reductions in the number of signatures required on designating petitions, reduction of the number of delegates at the nominating conventions and/or expansion of the time New York State Supreme Court judicial candidates have to lobby delegates. These remedies would have addressed the fundamental criticisms of the convention process that were the focus of the Second Circuit's opinion. Pet. App. 14, 62-64 (signature requirements); Pet. App. 80 (number of delegates); Pet. App. 18, 80 (lack of time for lobbying).

A. The Courts Below Failed To Properly Apply *Ayotte* Because Of Their Misreading Of The New York State Election Law

The courts below failed to narrowly tailor their relief because they misinterpreted New York's election law as

having a so-called default remedy. Pet. App. 82 (discussing the purported default nature of Election Law § 6-110); *id.* at 23 (noting that the district court enjoined conventions "[b]ased upon the provision of state election law providing for primary elections as the default nominating process. . . . "). Nothing could be further from the truth. New York election law, far from defaulting to an open primary, clearly and unequivocally mandates that party nominations for the office of New York State Supreme Court Justice shall be conducted by party convention. *See* Election Law § 6-106. The statutory provision relied upon by the courts below, Election Law § 6-110, when read in conjunction with the remainder of the election law and with the relevant provision of the New York State Constitution, clearly carves this office out of the provision calling for the use of open primaries for other offices.[7]

If, as the district court purportedly held, it was using a so-called primary "default" already encompassed within New York's election law, then N.Y. Election Law § 6-136 should govern the signature requirements for such primaries. Yet, the district court invalidated the applicability of this election law provision finding that "[i]t cannot be said, as the defendants assume, that the legislature intended N.Y. Elec. Law § 6-136, in anything like its current form, to apply to primaries for Supreme Court Justice because no such primaries were contemplated." Supplemental Preliminary Junction Order dated April 7, 2006 at 3-4. Therefore, the invalidation of the provision of this election

[7] The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. The terms of the justices shall be fourteen years from and including the first day of January next after their election. N.Y. Const. art. VI, § 6[c].

law provision after conceding that it was constitutional is a recognition that the legislature never intended for the selection process for New York State Supreme Court Justices to "default" to an open primary.

B. The Rulings Of The Courts Below Sweep Too Broadly, Exposing Other Conventions And Screening Panels To Standardless Judicial Scrutiny

The Second Circuit's ruling is not confined to the facts of New York's nomination system for trial level judges. Rather, the Second Circuit's ruling would jeopardize all nomination systems that do not "afford candidates and voters a realistic opportunity to participate in the nominating process." Pet. App. 41. *See Terry v. Adams*, 345 U.S. 461 (1953). If not reversed, the litigation over the vague standard of what constitutes a "realistic opportunity to participate" will surely be expensive and burdensome.[8] Moreover, the number of such challenges could be substantial. If not reversed, the Second Circuit's ruling would apply to "each State-created or State-endorsed 'integral part of the election machinery.'" Pet. App. 38, 39 (citing *United States v. Classic*, 313 U.S. 299 at 316 and 318 (1941)). *See also* Pet. App. 38 (scrutiny would be applied to "all integral phases of the nominating process, regardless of whether the nomination is conferred directly by public

[8] *Cf. Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (First Amendment vagueness doctrine applies to government action relating to speech if the government regulates speech or conditions a generally available benefit upon the content of speech; *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("prohibition against vague regulations of speech").

ballot or indirectly by the votes of elected party officials" (citing *Moore v. Olgilvie*, 394 U.S. 814, 818 (1964)).

Despite paying lip service to the notion that not all convention systems are unconstitutional, a concession required by *American Party of Texas v. White,* 415 U.S. 767 (1974), the Second Circuit made clear that its ruling extends even to "facially valid regulations." Pet. App. 41. The blunderbuss approach of the courts below flows from the nature of the fact-finding below. Had there been a full trial on the merits, the respondents would have to prove "beyond a reasonable doubt" that the challenged statutes are unconstitutional. *New Alliance Party v. New York State Bd. of Elec.,* 861 F. Supp. 282, 292 (S.D.N.Y. 1994). Although the presumption of constitutionality is rebuttable, the standard in New York is that "[i]nvalidity must be demonstrated beyond reasonable doubt." *McGee v. Korman*, 70 N.Y.2d 225 (1987). The courts below erred by failing to apply this standard.

This Court has the power and, indeed, the responsibility to conduct *de novo* review of all constitutional facts and their application to the law. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 136 (1999) ("we have assumed, as with the other fact-intensive, mixed questions of constitutional law, that independent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.") (citations and internal quotations omitted).

A close examination of the record highlights the vast difference of evidence produced at a preliminary injunction hearing as opposed to a full-blown trial. In this case, the application for the preliminary injunction was a technique

which enabled the plaintiffs in the district court proceeding to sidestep the evidentiary burdens, associated with a trial or summary judgment motion. The evidence was anecdotal, limited and redundant. The so-called voluminous "10,000-page preliminary record" which purportedly "establish[es] how the scheme functions" (Resp. Cert. Br. 2) consisted of copies of petition signatures, transcripts of judicial conventions throughout New York State, signature certifications, newspaper articles, some of them decades old, and even deposition transcripts from old unrelated cases, much of which was of little import and would probably have been inadmissible at a trial bound by rules of evidence.[9] The respondents called few witnesses in support of their contention about the unconstitutionality of the convention system. *See* Appendix 1. The so-called "evidence" simply does not support a sweeping statewide remedy. The courts below appear to have inferred that the

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[9] As stated in the Brief for the Appellants in Support of Reversal of the district court decision at n16: "The mountain of hearsay that the district court admitted into evidence is staggering. Such hearsay included: (1) news articles, many of which were opinion pieces and over a decade old (HE-4981-87 (Exs. 70-74); (2) documents with embedded hearsay, such as reports containing anonymous conclusions regarding conventions (HE-4988-5419, 5685-762 (Exs. 77-79, 90)); (3) the ten year-old transcript of Farrell's testimony from another case, from which the district court apparently made credibility determinations (SPA 33-35; HE 5960-6421 (Ex. 98), *see* Tr. 123-124; 1151; 1156-1163); and (4) impermissible opinion testimony (Tr. 30:8-19, 38:23-24; SPA 21-22). Although this evidence was inadmissible, *e.g.*, *Tasini v. New York Times Co.*, 184 F. Supp. 2d 350, 357 (S.D.N.Y. 2002) ('Newspaper articles are simply not evidence of anything'), and Appellants objected vigorously to its admission (*see, e.g.*, JA-1464-69, JA-1518-20), the district court decided that all hearsay was admissible in a preliminary injunction hearing. Respectfully, it was improper for the district court to have relied on such evidence to ground the issuance of final relief in the case."

problems encountered in a few counties or districts apply statewide. Testimonies of the petitioners' defense witnesses, many of whom were elected New York State Supreme Court Justices, were marginalized and, in some cases, completely disregarded as the district court relied on a handful of witnesses when it displaced the will of the legislature. Pet. App. 68, 109, 111, 122-125.

The rulings of the district court were rendered in a preliminary injunction hearing on a record that the parties did not believe would provide the basis for permanent injunctive relief. Pet. App. 77. This Court has correctly cautioned that findings in the preliminary injunctive context are inherently different from those needed for permanent relief. This Court has ruled that findings of "likelihood of success on the merits" are not "tantamount to decisions on the underlying merits"; the two are "significantly different." *University of Texas v. Camenisch,* 451 U.S. 390, 393-394 (1981).

The courts below did not heed the admonition of *Camenisch* and instead relied on the hearsay and anecdotal evidence adduced in the preliminary injunction hearing, without requiring the rigors of a full *evidentiary* trial on the merits. As a result, the district court's holding that a "realistic opportunity to participate" was denied rests almost entirely on the contention that the system should be invalidated because "county leaders . . . actually wield enormous and dispositive power in the process by which Justices of the Supreme Court are selected", delegates generally follow the wishes of their local district leader, and district leaders, in turn, generally follow the wishes of their county leader. Pet. App. 135. The courts below made this finding even though they acknowledged "that no

delegate testified to receiving express instructions on how to vote." Pet. App. 66.

It is, of course, not uncommon for delegates at political conventions to follow the lead of party insiders. If the clout of political leaders is the principal basis for judicial attack on a nomination system, the court of appeal's ruling could jeopardize an array of political conventions. For example, party leaders who are *not* elected through primaries make up over 800 delegates at the Democratic National Convention. These so-called superdelegates, who include Democratic members of Congress, governors and state party chairmen, will account for nearly 40% of the votes needed to clinch the nomination.[10] As one political source put it:

> "[t]hose [superdelegate] votes could mean the difference between victory and defeat for an upstart front-runner such as former Vermont Gov. Howard Dean. A narrow delegate lead in July may not be enough to protect him from a convention coup if party insiders decide one of his Democratic rivals would fare better in the general election. Those insiders could conceivably throw their votes to another candidate who brings a sizable number of his own committed delegates to the convention."[11]

Under the Second Circuit's standard, the Democratic National Convention's superdelegate system would surely be called into question. And the Republican Party would not be immune either. It has often been said that Republican

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[10] *What Chance of a Superdelegate Showdown at the Dem Convention*, The Hill (November 5, 2003) (avail. on NEXIS, News and Business file).

[11] *Id.*

leaders dictate their party's choice at the national conventions, leading the preseason favorite to win every Republican nomination since 1968.[12] As recently as 1996, half of all Republican primaries used winner take all systems, which tend to entrench front runners supported by party leaders.[13]

The national political conventions are not the only nomination system placed at risk. Ironically, the very screening panels supported by many who would reform the judicial selection process in New York would be exposed to judicial review.[14] Many of these screening panels (at least in New York) are state-sanctioned panels, appointed in part by the chief judge in the state.[15] If these panels serve their intended function, they will serve as gatekeepers, effectively reducing the choices available to the electorate since, in theory, only those candidates with the screening panels' "stamp of approval" will be viable[16] But in that case

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[12] Canellos, Peter, *Romney is Fast Rising as a Serious Contender*, The Boston Globe, December 12, 2006.

[13] The Green Papers, Election 2000-2004 Glossary (available at http://www.thegreenpapers.com/Definitions.html).

[14] Ironically, the district court wrote that "[t]he screening panel in the First Judicial District has had a salutary effect on judicial selection. Specifically, it has made it much more likely that the candidates selected by the county leaders are highly qualified. The panel is constituted pursuant to a "double-blind" procedure that ensures an important measure of independence. Though it is not free of political influence altogether, the county leadership deserves praise for having created it many years ago and for abiding by its decisions." Pet. App. 148.

[15] 22 NYCRR Part 150, Rules of the Chief Administrative Judge.

[16] New York State officials have expressed expectation that the commissions will be gatekeepers. "Although the commissions findings will might be binding, Judge Jonathan Lippman, the Chief Administrative Judge of the State of New York, said he expects that party leaders

(Continued on following page)

the screening panels would arguably be subject to judicial scrutiny as a "State-created or State-endorsed 'integral part of the election machinery. . . . '" Pet. App. 39, citing *Classic*, *supra* at 318. As such, the upshot of the Second Circuit's opinion would mandate that voters be given "a realistic opportunity to participate" in the screening panel's deliberations. Such public access would effectively destroy the candid discussions necessary for screening panels to function.

C. The Remedy Imposed by the Courts Below Was Geographically Overly Broad

The district court invalidated the entire statewide system even though it acknowledged that the situation in the First Judicial District, only *one of the twelve* New York judicial districts was the "dominant subject by far" in the preliminary injunction hearing. Pet. App. 132. Remarkably, far from finding that the situation in the First Judicial District rose to the level of unacceptably unconstitutional atrocity, the district court held that the nomination process in the First Judicial District is characterized by "a measure of quality control that is unmatched in the state." Pet. App. 132.

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will demand the commissions' Good Housekeeping Seal of Approval and that if they don't, the voters will." The executive director of the Fund for Modern Courts, Dennis Hawkins, said he agrees the voters will heed the commissions' suggestions. Like the New York State Bar Association, Mr. Hawkins advocates a constitutional amendment that would replace the current election system with appointments, but he said he believes that the commissions are step in the right direction." *No State Judges Move to Bolster Public's Confidence*, The New York Sun, February 9, 2007.

The findings of the courts below in the other judicial districts are even less explicable. In its recitation of the facts, the district court *does not even mention* the Fifth, Sixth, Eleventh, and Twelfth Judicial Districts. Pet. App. 132-149. In two sentences reciting purported facts that were unburdened by any citations to the record, the district court found the nomination system that was used in the Third Judicial District to be unconstitutional. Pet. App. 143.

The district court's findings with respect to the Second, Fourth, and Seventh Judicial Districts rely on evidence that is, at best, anecdotal. Aside from a citation to hearsay (Pet. App. 136 n.32), the discussion of the Second Judicial District focuses almost entirely on the travails of named plaintiff Margarita López Torres (Pet. App. 136-143). Likewise the discussion of the Fourth District centers on Justice Joseph Sise (Pet. App. 143-145) to the exclusion of virtually anything else. And the analysis of the Seventh District relies heavily on the experience of John Regan. Pet. App. 146-147. Such anecdotes demonstrate, at most, that the convention system has failed in three particular instances which are scattered over a decade and provide little basis for a sweeping invalidation of the entire convention system.

II. The Courts Below Should Have Taken Into Account The Impact A Partisan Open Primary Would Have On Racial Diversity

Instead of imposing a default remedy based upon a misreading of New York's election law, the courts below should have conducted full fact finding, including a consideration of the impact of their remedy on the diversity of the bench and the constitutional rights of ethnic minorities, such as Asian Americans.

Such fact-finding may well have shown that convention systems promote the interests of diversity.[17] By way of example, pure convention systems, largely not influenced by primary elections, resulted in the nominations of the first Catholics ever nominated to national tickets (Al Smith, 1928, and John Kennedy, 1960), the first woman ever nominated on a national ticket (Geraldine Ferraro, 1984), and the first Jewish candidate on a national ticket (Joe Lieberman, 2000). Ferraro and Lieberman were nominated as vice presidential candidates, for which no primary votes were cast. In contrast, since the advent of primaries as the principal basis for selecting presidential nominees only white Protestant males have been nominated by the national conventions of both parties.[18] This example of the national party conventions demonstrates that, at minimum, further fact-finding was warranted as to whether the interests of diversity are better served by a convention system as opposed to open primaries.

More complete fact-finding may also have shown that open primaries are inimical to the cause of diversity. As set forth below, the results of open primaries in other jurisdictions should, at minimum, call into question any contention that open primaries promote diversity.

II. A Partisan Open Primary Election System Will Likely Disadvantage Asian Americans Because Voting Will Tend To Take Place Along Ethnic Lines

The experience of Asian Americans in states with partisan election systems provides strong support for several of the opinions expressed by the petitioners' expert, Dr. Michael Hechter, Emeritus Professor of Political Sociology at the University of Washington. As Dr. Hechter testified, voting in judicial elections tends to take place along ethnic lines:

> "[T]he tyranny of the [majority] is always a problem in direct election. There can be persistent underrepresented minorities who can never win the election because there aren't enough of them. . . . There are not enough registered voters ever to prevail in that unit. They will always be consistently out voted."

(Tr. 1223:8-24). Dr. Hechter's conclusions are supported by court decisions concluding that New York politics is characterized by bloc voting and racial polarization. *See, e.g., Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, 796 F. Supp. 681, 685 (E.D.N.Y. 1992) (African American and Latino voters in the state of New York had established the existence of racial bloc voting); *Butts v. City of New York*, 614 F. Supp. 1537, 1547 (E.D.N.Y. 1985)

("racial and ethnic polarization and bloc voting exists in New York City to a significant degree").

In the district court proceeding, New York State Senator Martin Connor also attested to the strength of bloc voting in New York, testifying that, in an open primary in the Second Judicial District, "you could not elect an Italian American, an Irish American, maybe have a hard time with a Latino." (Tr. 2124:4-2125:4). *See also* Testimony of Dennis Ward (Tr. 343:23-344:1) (stating that, in the Eighth Judicial District, no ethnic minorities would ever win a party nomination in an open primary system).

For Asian Americans, the picture may be even bleaker. As one of the few Asian Americans to win election to the judiciary in Illinois, Judge Sandra Otaka, has stated:

> "[I]f African Americans cannot [elect their candidates] at 22% how in the Sam Heck are we going to do it at 4% when you have the name Fujimoto or Svrapi Punja [on the ballot] in Illinois? I was told to put an apostrophe after my O because if I did that, I would have a greater chance at winning county-wide. The bottom line is in Cook County and I imagine other places. . . . if it isn't O'Brien or O'Malley or it isn't Smith or it isn't a name that they have a level of comfort with, then it's going to be a lot more difficult for them to get elected. *Let me tell you, having an Asian name does not facilitate access to election through the political process* [emphasis added]."[19]

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[19] Judge Otaka was quoted in Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity*, June 2005, at 17.

The extent of the uphill battle that Asian Americans may face in seeking elective office is further demonstrated by the fact that recent polls show that as many as 30% of Americans believe that Chinese Americans are more loyal to China than they are to the United States, and that 25% of those polled are unsure.[20] As recently as 1997, Asian Americans were "publicly attacked as disloyal to the United States . . . Asian American political interests found themselves on the very public receiving end of bipartisan hostility."[21] Asian Americans have been regarded as "immutably foreign and unassimilable with whites on cultural and racial grounds in order to ostracize them from the body politic and civic membership."[22] As one commentator suggested, "I ask you whether the electorate voting for a candidate who is Chinese American running for judicial office is likely to vote for that candidate if they hold those kind of suspicions?"[23]

Moreover, Asian Americans suffer from low voter registration and turnout. For example, in 1995, only 20% of all eligible Asian American voters in Flushing, Queens, were registered to vote.[24] And whites have a voting rate

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[20] These figures are presented by Professor Sherrilyn Ifill and appear in Lawyers' Comm. For Civil Rights Under Law, *id.* at 18.

[21] Kim, Thomas P., *The Racial Logic of Politics: Asian Americans and Party Competition*, Temple Univ. Press (2007) at 2.

[22] *Id.*, quoting Claire Jean Kim, *The Racial Triangulation of Asian Americans*, Politics and Society 27 (March 1999) at 105-138.

[23] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity*, June 2005, *supra*.

[24] Dugger, Cecilia W., *Queens Old Timers Uneasy as Asian Influence Grows*, New York Times, March 31, 1996 at A1.

nearly double that of Asian Americans.[25] Perhaps because of such factors, even as their numbers have increased, Asian Americans have not attained commensurate political clout. In Los Angeles, New York and San Francisco, the three cities with the highest populations of Asian Pacific Americans, Asian Pacific Americans hold only one out of a total of seventy-seven city council seats elected by single-seat districts[26] in these three cities. Strikingly, no Chinese American city council member has ever been elected in the Manhattan City Council District that encompasses Chinatown.[27] Until recently, a Queens district with a more than 30% Asian American population was represented by a city councilwoman who described the influx of Asian Americans as "an invasion, not an assimilation" and described Asian Americans as "more like colonizers than immigrants."[28]

The district court recognized that, at a minimum, diversity in the judicial selection process is "a legitimate state interest." Pet. App. 174. Asian Americans are, of course, a significant part of that diversity. The district court, however, did not adequately consider, and failed to

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[25] Hajnal, Zoltan and Trounstink, Jessica, *Where Turnout Matters: The Consequence of Uneven Turnouts in City Politics*, The Journal of Politics, Vol. 67, No. 2, May 2005 pp. 515-535 (at the local level whites outvote Latinos and Asian Americans by a voting rate ratio of almost two to one).

[26] Hill, Steven, *New Means for Political Empowerment in the Asian Pacific American Community*, Asian American Policy Review (Spring 2001).

[27] Aoki, K., *Asian Pacific American Electoral and Political Power, Panel I: A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power after 2000*, 8 UCLA Pac. Am. L.J. 1, 24.

[28] *Id.* at 30.

protect, that interest in diversity when it imposed its remedy. The district court also failed to take into account the associational rights of minorities, such as Asian Americans, to organize and participate within the political parties of their choosing and within that party's chosen method of nominating judicial candidates – a process that Dr. Hechter described as logrolling. Those associational rights are, themselves, a compelling state interest, which was sufficient to uphold the convention system. Simply put, the district court did not, as it claimed, impose "the least intrusive course" when it directed open primaries. Pet. App. 183-184.

III. District-Wide Judicial Elections In New York State Would Be Prohibitively Expensive

What makes the New York State Supreme Court different from other courts within the state is the vast scope of its jurisdiction over subject matter in law and equity and its unlimited monetary jurisdiction.[9] N.Y. Const. art. VI, § 7[a]. There is a great deal at stake, especially financially and especially within the major urban and suburban judicial districts, in which there are large, long-standing, well-established social, financial and commercial interest and in which most Asian Americans in the state are located. The inherent unseemly nature of raising large sums of money to fund expensive campaigns

[9] In addition, justices who are elected to the New York State Supreme Court may be eligible to serve as justices of its Appellate Terms or Appellate Divisions, which control the licensing, admission and discipline of attorneys. Justices who serve in the New York State Supreme Court also control most of the court appointments of attorneys and other professionals in civil and criminal matters as well as setting the fees and reimbursements for expenses for those appointees.

for judicial races, particularly for sitting New York State Supreme Court justices, threatens the independence of the judiciary. This was apparent to the New York State Legislature in 1921 when it rejected the direct open primary system it had enacted in 1911 by enacting the convention system which is currently in place. Pet. App. 9.

The expense of a partisan open primary system may also adversely affect the prospect of a diverse judiciary. There is every reason to believe that, as stated in the Final Report to the Chief Judge of the State of New York of the Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"), "primaries pose a great risk of attracting substantial increases in partisan spending on New York State judicial campaigns, which, as our research shows, would serve to further undermine confidence in the judiciary."[6] The negative impact of prohibitively expensive district-wide judicial open primaries would affect Asian Americans as their population concentration is within the New York City metropolitan area – the most expensive media market in the country.[7]

The negative impact of these open primaries affect the rural areas in upstate New York, too. In its two-page *amicus* brief to the Second Circuit in this case, the St. Lawrence County Bar Association cogently expressed concern that the remedy of imposing open primaries is "the worst possible solution."[8] The St. Lawrence County Bar Association further stated in its brief that "[t]he

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[6] Feerick Commission Report at 3 (Feb. 6, 2006).

[7] See SB139 Service Reports (Standard Rate and Data Service).

[8] St. Lawrence County Bar Association Amicus Curiae Brief in Support of Reversal of the district court decision, No. 8.

parties will be unable to create balanced slates including a group of candidates based on gender, race and *geography* [emphasis added] . . . ", that "[t]he Fourth Judicial District [in which St. Lawrence County is located] encompasses the largest, most rural counties in New York State and thus, candidates would have to circulate petitions covering a substantial geographical area . . . ", that "[t]he expense of participating in such primaries would be exorbitant . . . " and that "[t]he northern-most Counties in this State would most likely *not* have resident Justices, instead being served by Justices elected from the far-flung counties Schenectady and Saratoga, requiring counsel and litigants, alike, to drive substantial distances, thus increasing the cost of litigation to those of the most rural population who, presently, can least afford legal representation."[9]

Indeed, as the respondents themselves have conceded, New York is one of the most expensive states in which to run a campaign.[10] For example, general election legislative candidates (who run in districts that are often less populous than the areas in which a State Supreme Court Justice would be forced to run) raised a total of more than $50 million in New York State in 2004.[11] Some New York State Senate races have generated spending of more than $3 million per candidate, in one case amounting to more

[9] *Id.*

[10] See Declaration of William Lipton in Support of Plaintiffs' Motion for Preliminary Injunctive Relief, dated June 1, 2004 (JA300).

[11] Common Cause, The $1,000 Club: What New York State Political Campaigns Cost This Much, Those Costs are Rising and Who's Picking Up the Bill (March 2006) at 3.

than $51 per vote.[36] Even non-New York City races can cost millions of dollars: the 2005 race for Westchester County Executive cost a total of almost $4 million and the race for Westchester County Clerk cost a total of $673,931.[37]

The expense of campaigning for judicial office may impose disproportionate burdens upon Asian Americans and other members of minority groups. As Geri Palast, Executive Director of Justice at Stake Campaign,[38] has stated, "The high cost of campaigns poses a threat to minority candidates who may not be able to raise as sufficient a war chest to be competitive in these elections."[39] Professor Spencer Overton, a Professor of Journalism at George Washington University School of Law, has also noted that, although minority group members make up almost 30% of the nation's population, they make up less than 1% of the contributors to federal campaigns.[40]

In fact, over 55% of the contributions by candidates in New York State campaigns during 2002, 2004 and 2005 have come via checks written for more than $2,100 (the federal contribution limit) and, thus, would have been

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[36] *Id.* at 9.

[37] *Id.* at 10.

[38] Justice at Stake Campaign is a "nationwide, nonpartisan partnership of more than thirty judicial, legal and citizen organizations" seeking to "campaign for fair and impartial courts." http://www.faircourts.org/contentviewer.asp?breadcrumb=8,384

[39] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and their Impact on Diversity*, June 2005, *supra*, at 15.

[40] *Id.*

illegal in a federal election." As a result, a comprehensive study of nationwide legislative elections found that "white candidates for contested seats typically spent more than minorities in similar states."[7] As Professor Ira Rohter, an Associate Professor of Political Science at the University of Hawaii at Mānoa, said, "People in minority groups typically are lower-income, and they don't have access to the kinds of corporate funding that white people normally would." *Id.*

For this reason, the American Bar Association has supported public financing of judicial elections "to create more opportunities for attorneys of all racial and ethnic backgrounds who do not have . . . the personal or political connectedness to raise large sums of money for elections."[8] However, the remedy imposed by the courts below does not – and cannot – provide for public financing, and there is no reason to believe that such financing is politically or fiscally feasible in an era of soaring budget deficits.

Professor John D. Feerick of Fordham University was quoted saying: "[t]here was no enthusiasm for a primary without public financing and there is no political reality for a vast public financing system." Jennifer Medina, *Albany Is Split Over a Plan to Pick Judges*, New York Times, February 28, 2006. As stated in the Feerick Commission Report at Page 11, "without public financing of judicial elections, the judicial nominating convention . . .

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[7] Common Cause Report, *supra*, at 3.

[8] See Mark Hansen, Study: Minority Candidates for State Office Often Raise Less Money, Associated Press, March 29, 2006.

[9] Lawyers' Comm. For Civil Rights Under Law, Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and their Impact on Diversity, June 2005, *supra*, at 15 & n.51.

system should be retained rather than replaced by primary elections."

Thus, for the foreseeable future, if the remedy imposed by the courts below is not reversed, it will inflict crushing financial burdens upon minority candidates seeking judicial office.

IV. The Courts Below Erred By Permitting The Enactment Of New State Action In The Form Of Open Primaries After Striking New York's Judicial Convention Statutes in Their Entirety

Assuming that it was proper for the district court to refrain from following *Ayotte* and *Booker* and thereby striking the entire convention statutes, it was improper for the courts below to impose new state action in the form of open primaries as a core power reserved for the states in the United States Constitution in determining the time, place and manner of the election of state officers. See e.g., *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), citing *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) ("States retain the power to regulate their own elections."). Rather than proceed cautiously so as not to trespass on the constitutional prerogative of New York State, the district court mandated open primaries upon New York State, baldly stating that it would have been "irresponsible" for it to have "left such a gaping hole in the State's electoral scheme." Pet. App. 82. Its conclusion, however, rests on the flawed assumption that party nominations require state regulation. New York's political parties used nominating conventions between the years 1846 to 1911, notwithstanding the absence of any statute mandating

No. 06-766

In the

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, THE HISPANIC NATIONAL BAR ASSOCIATION, THE PUERTO RICAN BAR ASSOCIATION, LATINO LAWYERS ASSOCIATION OF QUEENS COUNTY, THE CENTER FOR LAW AND SOCIAL JUSTICE, THE AMISTAD BLACK BAR ASSOCIATION OF LONG ISLAND, and THE ROCHESTER BLACK BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE EXISTING CONVENTION SYSTEM FAILS TO SERVE THE STATE INTEREST OF DIVERSITY	5
II. THE SECOND CIRCUIT SHOULD BE AFFIRMED	12
CONCLUSION	13

TABLE OF AUTHORITIES

Page

Cases:

Ayote v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) 12

Virginia v. American Booksellers Ass'n, Inc., 484 U.S. 383 (1988) 12

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Primary Races: New York Tally, N.Y. Times, Sept. 17, 1987 7

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

All eight organizations joining in this submission to urge the Court to affirm the Second Circuit's ruling have long worked on behalf of minority and female lawyers and litigants to achieve fairness in and through the courts of New York. Both by undertaking to promote minority lawyers to the bench and by affirmatively litigating civil rights cases over the years, all these organizations have an active, daily role in attempting to ensure that the judiciary of New York State is open, fair, and reflects the diversity of those it is meant to serve.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") has championed an equitable society since its founding in 1972. Using the power of the law together with advocacy and education, PRLDEF protects opportunities for all Latinos to succeed in school and work, fulfill their dreams, and sustain their families and communities.

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all *amicus* briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

The Hispanic National Bar Association ("HNBA") is a non-profit, non-partisan, national legal association representing the interests of more than 38,000 U.S. Hispanic attorneys, judges, law professors, law graduates, law students, and legal professionals in the United States and Puerto Rico. Part of the HNBA mission is to ensure meaningful participation of Hispanics in the legal profession, including through a diverse judiciary. The HNBA's strong interest in the improvement of the administration of justice extends, in particular, to fairness and diversity in judicial selection processes.

The Puerto Rican Bar Association ("PRBA") is a professional organization composed of members of the bar and law students of Latino ancestry as well as other interested persons. The PRBA was founded to provide a forum for Latino and other lawyers who are interested in promoting the social, economic, professional, and educational advancement of Latino attorneys, the Latino Community and the administration of justice.

The Latino Lawyers Association of Queens County is an association composed of Latino and non-Latino lawyers, judges, law students and other interested professionals. Its mission is to promote the interests, advancement and opportunities for Latino lawyers, judges, law professors, and law students and to educate and inform the community, especially the Latino community, of their rights.

The Center for Law and Social Justice at Medgar Evers College, City University of New York, is a community-based education, research, and legal organization. It provides quality advocacy, training, and expert legal services in a personal manner to people of African descent and the disenfranchised.

The Amistad Black Bar Association of Long Island was organized in 1996 specifically to increase the number of African Americans on the bench in Long Island, and to provide networking opportunities for African American attorneys. The association is comprised of over 100 attorneys and judges.

The Rochester Black Bar Association ("RBBA"), an affiliate of the National Bar Association, serves to promote and enhance participation by lawyers in the greater Rochester community. The RBBA promotes ethical standards, legal education and equal opportunity for African American lawyers who are engaged in the practice of law in the greater Rochester area. The RBBA, which currently has over 60 members, consists not only of attorneys but also of law students, paralegals, and court personnel.

SUMMARY OF ARGUMENT

The convention system enjoined by the courts below does *not* serve the State's interest in promoting racial and ethnic diversity on the bench. The hard numbers confirm that, and the Second Circuit and district court correctly found as much. In fact, a close examination of the data lays bare what *amici curiae* — the Asian American Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Hispanic National Bar Association, the Puerto Rican Bar Association, Latino Lawyers Association of Queens County, the Center for Law and Social Justice, the Amistad Black Bar Association of Long Island, and the Rochester Black Bar Association — have long known: the number of minority justices throughout New York State is dismally low and detrimental to the actual and perceived fairness of the judicial system with respect to the most disadvantaged citizens of New York.

Minorities seeking to become supreme court justices in New York are not served by a closed, back-door system built on cronyism and political favors. No diverse, fair system can be built by such means. As a blue-ribbon task force on diversity in the judiciary found fifteen years ago, opening the system is "*essential* to improving diversity on the bench. Now a candidate needs, or is perceived as needing, political entrees or even political party service in order to be a viable candidate for political office. Many well qualified minorities and women lawyers who are interested in becoming judges lack these particular credentials." HE-5776[2] (emphasis supplied).

Keeping minority lawyers from the bench only exacerbates the view of minority litigants and observers that the judicial system has little or nothing to do with them. After nearly a century, the system must be opened so that minorities can meaningfully participate. For that reason, *amici curiae* support the Second Circuit's ruling to affirm the district court in striking down the existing convention system, and believe this narrow approach to the remedy was appropriate under governing law.

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[2] "HE-__," "JA-__," and "Tr. __," refer to the Hearing Exhibits, Joint Appendix, and Transcript filed in the Second Circuit and in this Court. "Pet. App. __" refers to the opinions of the Second Circuit (Pet. App. 1a-92a) and district court (Pet. App. 93a-185a).

ARGUMENT

I. THE EXISTING CONVENTION SYSTEM FAILS TO SERVE THE STATE INTEREST OF DIVERSITY

Petitioners argue that the convention system promotes the State's interest in enhancing racial, ethnic and gender diversity on the bench. Br. of N.Y. County Dem. Comm. *et al.* ("County Br.") 46. After a close review of the undisputed data, the Second Circuit and the district court both rejected that argument. In particular, the Second Circuit concluded that petitioners had not satisfied their burden of demonstrating that the existing scheme reasonably served the State's interest in promoting diversity, and that, to the contrary, "[a] survey of the composition of the state's bench at the time this suit was filed suggests that over the course of 85 years the nominating process has, to put it mildly, failed to fully effectuate the state's goals as to geographic and racial diversity." Pet. App. 74a. The district court — which held the thirteen-day preliminary injunction hearing — likewise found the data did not reveal that diversity was advanced by the current system, Pet. App. 174a-75a, and further rejected as "flatly incorrect" the thesis of petitioners' expert that an alternative system with direct voter participation would curtail diversity. Pet. App. 176a.

The numbers of minority justices spread throughout the state's twelve judicial districts are not in dispute. *Every* judicial district in New York State has a substantial minority voting-age population, but many districts have *no minority justices at all*. HE-6769. As the Second Circuit found, at the time this litigation was filed, five of the districts, which together have 81 authorized supreme court justice seats, had *no* minority justices, including the Ninth Judicial District, whose voting-age population is more than one quarter

minorities.[3] Pet. App. 74a. Another three districts, which together have 90 seats, have a grand total of five minority justices, representing a far lower percentage of the overall bench than the comparable percentage of minorities in those districts' voting-age populations.[4] HE-6769.

While the defenders of the existing convention system repeatedly tout the numbers of minority justices in the districts which comprise New York City, County Br. n. 21, a proper examination of the data against the backdrop of the diversity of New York City itself reveals that even these numbers fail to support the convention system as the benevolent boon for minorities which petitioners try to cast it as.

As petitioners have been wont to point out, the percentage of minorities in the New York City judicial districts range from 31 to 44 percent based on 2001 numbers. *See* HE-7667; County Br. n. 21. But the comparative percentages of the voting-age population for these districts (the First, Second, Eleventh and Twelfth) belie the significance of even these numbers: minorities comprise from *50 to 82 percent* of these districts' overall voting-age populations. HE-7667. And the party bosses' relative benevolence to minorities in New York City only serves to accent the system's overall dismal record:

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[3] The Second Circuit noted that "[a]lthough it is not reflected in the record, . . . in 2005 the Ninth Judicial District elected a black Supreme Court Justice. This development does not alter our analysis: only one of the judicial district's 25 justices is a minority, *i.e.*, 4 percent, while minorities make up 27 percent of the district's voting age population." Pet. App. 74a, n. 11.

[4] The five districts that, as of 2001, had *no* minority justices are the Third, Fourth, Sixth, Seventh and Ninth, while the three districts with a combined total of five minority justices (or 5.5% of the total authorized seats) are the Fifth, Eighth, and Tenth districts, which respectively have the following percentages of overall minority voting-age population: 10.3%, 13.1% and 21.8%. HE-6769.

it is New York City's judicial districts which elect *92% — 57 out of 62 — of all the minority justices of the Supreme Court in New York State.* HE-7667, JA-1776 ¶ 99, HE-6769.

As the district court found, "the evidence the defendants have marshaled in support of this claim [that the convention system advances racial diversity] shows little more than that in New York City, where racial minorities exist in sufficient numbers that minority candidates do well in primary elections for Civil Court and other public offices, such candidates have also achieved success in obtaining Supreme Court nominations through the convention system. In other parts of the state, where minorities are present in much fewer numbers, minority representation among Supreme Court Justices is hardly remarkable." Pet. App. 174a-75a.

In fact, the available data suggests that within New York City, specific minorities would likely increase their numbers substantially if the district court and Second Circuit are affirmed and the existing convention system is enjoined.[5]

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[5] While the undersigned *amici* differ to some degree over which alternative system might best serve the goal of a diverse bench, all do agree that the current convention system fails to serve diversity. There is indeed support for the view that minorities and women can and do achieve positions through primaries, through commission-based appointment systems, or even through a convention system that actually allows for the meaningful participation of party members — which the current system categorically does not. For example, with respect to primaries as an alternative, as early as 1987, two Asian American candidates, Dorothy Chin Brandt and Peter Tom, defeated two white candidates in a county-wide Civil Court primary, *Primary Races: New York Tally*, N.Y. Times, Sept. 17, 1987, at B2. Rolando T. Acosta, a Dominican American, won a countywide primary for Civil Court in 1997. David Herszenhorn, *Race for City Hall: The Judiciary; 3 Lawyers Win Races to Lead the Democrats*, N.Y. Times, Sept. 13, 1997, at A27. Plaintiff Margarita Lopez-Torres, a Puerto Rican woman, won contested county-wide Civil Court primaries as recently as 2004, and prevailed against a white female candidate for re-election to a countywide Civil Court seat in 2002. *See* Pet. App. 15a. Hon. Diccia T. Pineda-Kirwan, a member of the Latino Lawyers Association of Queens County,

Although as of 2001 in the Bronx (the Twelfth Judicial District) 45.3% of the voting-age population was Hispanic, only 16.7% of the Supreme Court justices were Hispanic. HE-6766. Queens — the Eleventh Judicial District — had just a single Hispanic Supreme Court justice (2.6%) despite having a Hispanic voting-age population of 23.4%. *Id.* Moreover, that single justice (Hon. Jaime Rios) now sits in the Appellate Division — so there is not a single Hispanic justice sitting as a Supreme Court Justice in the Criminal or Civil Term, despite the rising Hispanic population of Queens. Hispanic voters are underrepresented in all four of New York City's judicial districts on the Supreme Court. *Id.*

In 2001, Asian Americans comprised 17.5% of the voting-age population in Queens, but just one justice out of 38 — or 2.6% — is an Asian American. HE-6767. And despite constituting 9.8% of the voting-age population in Manhattan, again only one justice, or 2.6% of the supreme court bench is Asian American. *Id.* In the Second Judicial District, Asian Americans constitute 7.4% of the voting-age population, but do not have a single Supreme Court justice on the bench.[6] *Id.*

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was elected to Civil Court in Queens County. Additionally, African American borough presidents have been elected in Manhattan on numerous occasions extending back as far as the 1970s. In the Bronx, Fernando Ferrer and Adolpho Carrion, both Latino, were elected to that countywide office, while in Queens, Councilman John Liu and Assemblyman Jimmy Meng both won primaries in 2001 and 2004. Errol Louis, *Strength in Numbers*, N.Y. Daily News, May 16, 2006.

[6] The studies and polls cited by *amicus* Asian American Bar Association of New York, AABANY Br. at 20-24, simply confirm the obvious: that racism against Asian Americans still exists in New York and across the country. In essence, AABANY argues that Asian American lawyers cannot compete effectively in judicial elections unless they first curry favor with political bosses at conventions to overcome low Asian American voter registration and turnout. AABANY's assertion is inaccurate and surely cannot be a justification for retaining the current convention system. In fact, because voter registration and turnout rates in New York's Asian American communities are steadily increasing, Asian

And, although African Americans have obtained representation in the First and Eleventh Judicial Districts beyond their proportions in those districts' voting-age population, they remained under-represented in the Second and Twelfth Judicial Districts. HE-6768.

Even the relative success in parts of New York City is called into doubt by certain data outside the City — such as the fact that as of 2001, there were *no* African American justices in the Ninth Judicial District even though African Americans are 10.3% of the voting-age population.[7] *Id.* The experience of *amicus curiae* Amistad Black Bar Association of Long Island is on point. All judges of color in Long Island — nine to be exact — are members of the association and all are African American; there are no other minorities represented on the bench in Long Island. Only one of the nine, Hon. Michele M. Woodard, sits in the Supreme Court. Prior to her election there was one other minority in the Supreme Court, the Hon. Marquette Floyd, who retired in 2002. Five of the nine judges of color sit in District Court, one in Family Court, one in County Court, and one in the Court of Claims. Moreover, only a single African American judge sits in Suffolk County — on the district court. Although the Amistad Black Bar Association has seen some new faces on

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Americans will have a greater voice in electing a diverse state judiciary if a fair and open political process is substituted for the current convention system. *See generally* Asian American Legal Defense and Education Fund, *The Asian American Vote in the 2006 Midterm Elections* (2007), http://www.aaldef.org/docs/AALDEF2006ExitPollReportMay2007.pdf; Asian American Legal Defense and Education Fund, *The Asian American Vote 2004: A Report on the Multilingual Exit Poll in the 2004 Presidential Election* (2005), http://www.aaldef.org/articles/2005-04-20_67_TheAsianAmeric.pdf.

[7] *See supra* n. 3.

the bench, the *status quo* remains in that there has not been any increase in the number of African American Supreme Court judges – there continues to be only one.

These more recent numbers only confirm that the findings made fifteen years ago, by a blue-ribbon Task Force on Diversity in the Judiciary appointed by Governor Cuomo, remain true today. In 1992, the task force found:

> We believe that another major cause of lack of diversity in the judiciary is the closed nature of the system now used in New York State to select judges.
>
> As we all know, our system is only nominally one of election. In practice, it is the political party leaders who have the decisive power to determine who will be nominated. Most often this nomination is tantamount to election.
>
> The Task Force believes that opening up this system is essential to improving diversity on the bench. Now a candidate needs, or is perceived as needing, political entrees or even political party service in order to be viable candidate for political office. Many well qualified minorities and women lawyers who are interested in becoming judges lack these particular credentials. They may be political independents, or members of a party that is not dominant in the area or, if party members, may not have been active in the organization in power. Rightly or wrongly, these lawyers perceive themselves as having no chance of becoming a judge under the current system for the "election" of judges. Our own experience is that their perception is well founded.

HE-5775 to 5776. A few years later, in 1996, the New York State Committee on Women in the Courts, appointed by the Chief Judge, similarly concluded that while there had been progress in increasing gender diversity on other courts in

New York State, there had been virtually no progress with respect to the Supreme Court. HE-6758. In their next report in 2002, the Committee pointed to statistics revealing that the Supreme Court bench had one of the lowest percentages of women sitting as judges — only 17% statewide.[8] HE-5755.

All of this data fully corroborates the direct experiences of *amici curiae* in dealing with the existing convention system. Over and over again, our members and constituents — minority attorneys and litigants alike — experience the system as being controlled by a powerful network that fails to overlap with their own communities and interests.

The experience of plaintiff Margarita Lopez Torres is exemplary. Unwilling to do the local party boss's bidding, she was shut out from a Supreme Court Justice position for years. As the Second Circuit noted: "Lopez Torres' experience was no anomalous political mugging." Pet. App. 29a. And as the district court noted: "Lopez Torres's seven-year effort to obtain her party's nomination for Supreme Court Justice is the selection process in a microcosm. The path to the office of Supreme Court Justice runs through the county leader of the major party that dominates in that part of New York State. Without his or her support, neither superior qualifications nor widespread support among the party's registered voters matters." Pet. App. 143a (footnote omitted).

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[8] There is support for the proposition that women can and do succeed through an alternate system of primaries. As early as 1977, a slate of female candidates, including Carol Bellamy, Marie Lambert and Ruth Messinger, all won contested primaries throughout New York City. N.Y. Times (Abstracts) 29, 1977 WLNR 112171 (Sept. 9, 1977) (reporting Lambert upset win); N.Y. Times (Abstracts) 21, 1977 WLNR 106221 (Sept. 21, 1977) (Bellamy); N.Y. Times (Abstracts) 29, 1977 WLNR 112177 (Sept. 9, 1977) (Messinger).

II. THE SECOND CIRCUIT SHOULD BE AFFIRMED

The existing convention system is detrimental to the members and constituents *amici curiae* serve, precisely because it is a system which shuts out minorities and requires the political boss's *imprimatur*. *See* Pet. App. 131a. Because the data — which is undisputed — supports our own experience of the system as one that is closed and fails to promote diversity in the judiciary, the Asian American Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, the Hispanic National Bar Association, the Puerto Rican Bar Association, Latino Lawyers Association of Queens County, the Center for Law and Social Justice, the Amistad Black Bar Association of Long Island, and the Rochester Black Bar Association all support the affirmance of the court below.

Although certain *amici curiae* supporting petitioners have called for a reversal and remand to the district court solely for a hearing on remedy, there does not appear to be support for that in the law. The district court found the convention system inherently unconstitutional, precisely because it functions to shut voters out from the process. It then followed the principles long espoused by the Supreme Court, both by striking as little of the statute as possible under the circumstances, and refraining from "'rewrit[ing] state law to conform it to constitutional requirements.'" *Ayote v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006) (quoting *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). Because it is not the role of the courts to redraft unconstitutional statutes, *amici curiae* believe the court below should be affirmed.

CONCLUSION

For the reasons stated above, the Court should affirm the court below.

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No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LOPEZ TORRES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE, REASON FOUNDATION, AND THE CENTER FOR COMPETITIVE POLITICS, IN SUPPORT OF NONE OF THE PARTIES

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. POLITICAL PARTIES ARE FIRST AND FOREMOST PRIVATE EXPRESSIVE ASSOCIATIONS WITH A FIRST AMENDMENT RIGHT FREELY TO SELECT, BY THEIR OWN CHOSEN MEANS, WHICH CANDIDATES TO SUPPORT FOR ELECTION. 7

II. THE PROGRESSIVE INCORPORATION OF POLITICAL PARTIES INTO THE STATE'S ELECTION MACHINERY PROVIDES NO CONSTITUTIONALLY SUFFICIENT JUSTIFICATION FOR DICTATING INTERNAL PARTY PROCEDURES. 11

III. THIS CASE PROVIDES A REASONABLE FIRST STEP IN RESOLVING THE CONFUSION BETWEEN THE PRIVATE ASSOCIATIONAL ROLE OF POLITICAL PARTIES AND THE PUBLIC ELECTION-RELATED REGULATORY ROLE OF STATES. 15

CONCLUSION 16

TABLE OF AUTHORITIES

Pages

Cases

American Party of Texas v. *White*, 415 U.S. 767 (1974) 3, 12

California Democratic Party v. *Jones*, 530 U.S. 567 (2000) 3, 8, 11

Democratic Party of United States v. *Wisconsin ex rel. La Follete*, 450 U.S. 107 (1981) 8

Eu v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989) 8

Smith v. *Allwright*, 321 U.S. 649 (1944) 11

Terry v. *Adams*, 345 U.S. 461 (1953) 3, 11

Torres v. *New York State Bd. of Elections*, 462 F.3d 161 (CA2 2006) 3

United States v. *Classic*, 313 U.S. 299 (1941) 3

Other Authorities

Federalist No. 10, THE FEDERALIST PAPERS (Rossiter & Kesler eds. 1999) 14

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the core First Amendment freedom of political associations to control their internal decision-making without interference by the State.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of political association and contra-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

venes Reason's avowed purpose to advance "Free Minds and Free Markets."

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the corresponding results of a more free and competitive electoral process.

STATEMENT

This case presents the unusual and troubling spectacle of two opposing factions within the major political parties each turning to the government as the means of forcing their views of how best to resolve intra-party competition upon their internal opponents. While the opposing forces each may have ample grounds for preferring either primary elections or nominating conventions as the method of deciding who the party should support for elected judicial office, resolving such intra-party factional disputes seems to be a quintessentially internal matter properly left to the parties themselves.

In this case, the two sides seem to accept that the process by which a political party nominates a candidate to stand for election has both public and private attributes but emphasize different sides of that dichotomy in an attempt to justify state

imposition of either conventions or primaries as a means of candidate selection by the parties.

The Second Circuit below, for example, started out by paying lip service to the notion, as described by this Court, that the political parties' means of selecting its nominees for office are not "'wholly public affairs that States may regulate freely.'" *Torres* v. *New York State Bd. of Elections*, 462 F.3d 161, 185 (CA2 2006) (quoting *California Democratic Party* v. *Jones*, 530 U.S. 567, 572-73 (2000)). But it then quickly turned to a number of this Court's cases finding that party primaries, because they serve as gateways to the general election ballot, involve state action for purposes of applying various constitutional provisions to constrain the conduct of such primaries. *Torres*, 462 F.3d at 185-86 (citing, *inter alia*, *United States* v. *Classic*, 313 U.S. 299 (1941) and *Terry* v. *Adams*, 345 U.S. 461 (1953). By emphasizing that party nominating procedures were integral parts of the public election process as a whole, the court below then found a right of voter participation and candidate access to such nomination procedures, found that New York's convention system for nominating candidates burdened that right, and justified its imposition of a party primary election as at least an interim measure for providing such participation and candidate access. *Torres*, 462 F.3d at 186-89, 191-93, 201, 206.

Petitioners, by contrast, seemingly accept some state control over the decision-making process by which political parties select their nominees, thus implicitly accepting the existence of a state-action component to party nominating procedures. Pet. at 14-15 (citing *American Party of Texas* v. *White*, 415 U.S. 767, 781 (1974) for the proposition that a State may limit parties to one candidate per office on the general election ballot and require parties to use conventions or primaries to settle intra-party competition). But petitioners likewise shift emphasis in the opposite direction by characterizing the nominating process as involving "internal conflicts within the party," focusing on the "associational rights of political par-

ties to determine how to best select their standard bearers" and a "political party's right to publicly endorse and support a candidate of its choosing," and ultimately relying on the First Amendment rights of political parties themselves, as supposedly distinguished from the First Amendment rights of the rank-and-file members of such parties. Pet. 12, 13, 24-28. They then oddly use that different emphasis to defend a state law that *compels* the major political parties to use a nominating convention to select their judicial candidates and, less oddly, to oppose an injunctive remedy compelling the parties to use a primary to select their nominees.

While *amici* here agree with petitioners that it is the private and free-association aspects of party nominating decisions that should be the central focus of this case, they disagree with the attempted distinction petitioners seek to draw between the rights of the party as an association and the rights of party members as part of that association. And *amici* further disagree with some of the implications petitioners seek to draw from the parties' First Amendment rights of free association. The First Amendment indeed protects the political parties in the methods they choose for resolving internal disputes and deciding what candidates to endorse and support as their standard bearers. But that protection certainly does not support a statute that *compels* the parties to use nominating conventions any more than it allows an injunction that compels the use of a party primary. Rather, the relevant, and entirely consistent, associational rights of both the parties and their members, suggest that the methods by which parties choose candidates to endorse and support should be left to the parties themselves and resolved by the free play of private politics within the parties, rather than by the stifling hands of the State or the courts. Such government intervention to side with one or the other intra-party faction short-circuits what would otherwise be an ongoing internal debate over candidate selection methods. While parties indeed have the right to structure their internal affairs, they must also bear the respon-

sibility for their structural decisions and party members thus have the correlative right to seek to influence those decisions without the State standing in the way or exerting its power in support of either side of an internal dispute.

SUMMARY OF ARGUMENT

1. Properly understood, the nomination by a political party of a candidate – one of the standard-bearers of the party – is a private act of expression and association that lies at the heart of the First Amendment and that must be left to the parties themselves as to the method and means for making such a selection. Numerous cases from this Court have recognized the fundamental and protected nature of a party's decision-making process with regard to its support for candidates for elected office. The decision of who represents the party, and who to support in a bid for election, lies at the heart of free association and operates independent of the process for actually getting that prospective candidate on the ballot. Even where a State chooses to free-ride on party selection processes in determining a candidate's qualification to be placed on an election ballot, the underlying process remains fundamentally private and protected, and it is only the State's separate decision regarding what significance or effect to give such party decisions that constitutes genuine state, rather than private, action. From that perspective, state laws compelling parties to use particular means of deciding who to support in an election represent a severe infringement on the First Amendment rights of the parties and their members.

2. The authority and interests of a State in regulating elections generally, and ballot access in particular, do not extend to controlling the internal affairs of private political parties. While it is true that the conduct of an election and the state decisions regarding who to place on the ballot are public activities in which the State has a variety of compelling interests, those public activities and interests cannot be pursued at the expense of destroying the constitutionally protected free-

dom of association that makes elections meaningful democratic exercises in the first place. Whatever the State's justification for compelling political parties into the role of ballot gatekeepers, the decision to use partisan ballots remains only a choice, not a necessity, and if that choice is then used to justify coercive regulation of the parties' freedom of association, it may cease to be a permissible choice. If the States are to free-ride on the decisions of private associations, they should take such associations as they find them or, alternatively, stop relying on such associations and adopt a set of neutral rules for ballot access that operate independently from such private associational activity. There are ample alternative means of serving any legitimate state interests in regulating elections and ballot access, and any further justifications for forcing elections through the partisan lenses of parties are either non-compelling or are in fact antithetical to the freedom of association protected by the First Amendment.

3. The proper application of First Amendment principles in this case leads to the conclusion that this Court should affirm in part on other grounds, vacate in part, and remand for further proceedings as to remedy. The freedom of association protected by the First Amendment precludes the State from interfering with the internal affairs and choices of political parties by mandating that they select their standard-bearers in a particular fashion. The law *requiring* judicial nominees to be selected by nominating convention thus is indeed unconstitutional, though not for the reasons given by the court of appeals. The right being denied is not that of the rank-and-file members of the party to have a say in nominations in a particular manner or with particular effect, but rather the right of all members of the association, and of the association itself, to resolve internal disputes about candidate selection methods as the party and its members see fit.

As to the remedy, however, this Court should vacate the injunction and remand for further proceedings to determine whether New York law, absent the convention requirement, in

fact requires parties to use primaries to select judicial candidates. If New York law does not so require, the choice of candidate selection method should be left to the parties themselves. If, however, New York law does require primaries as the default mandate, the parties then should have the opportunity to challenge such a requirement on the same grounds described herein for striking down the convention requirement. The State likewise would then have an opportunity to offer any arguments it could marshal as to whether and why the two requirements might be treated differently notwithstanding the First Amendment principles discussed herein.

ARGUMENT

The decision below and the position of petitioners both conflate the protected private roles of political parties and the legitimate public function of government in regulating elections. While each side in this case seeks to emphasize a different aspect of the conflated rights and interests, they both reach the same erroneous view that it is up to the State to enforce and require a preferred means for a party to select its standard bearer in the form of a candidate for judicial office. The dispute between petitioners and respondents over whether conventions or primaries are the best method of resolving intra-party competition is ultimately a private dispute to be resolved within each party itself, without the State weighing in and enforcing the views of either internal faction in such disputes.

I. Political Parties Are First and Foremost Private Expressive Associations with a First Amendment Right Freely to Select, by Their Own Chosen Means, which Candidates to Support for Election.

In *amici*'s view, political parties are fundamentally private expressive associations protected by the First Amendment *both* as to their decisions of who to support for elected office *and* as to the means by which they reach such decisions.

Numerous decisions from this Court have recognized the fundamentally private character of parties as political associations and the First Amendment's protection of internal party decision-making processes. *See, e.g.*, *California Democratic Party* v. *Jones*, 530 U.S. at 573 (Constitution protects parties' "internal processes"); *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (First Amendment protects processes by which party selects a "standard bearer"); *Democratic Party of United States* v. *Wisconsin ex rel. La Follete*, 450 U.S. 107, 122 (1981) (freedom of party to define and limit those who constitute the association). In the end, whether a private political expressive association chooses to reach its decisions by emulating democratic elections and polling its membership or instead adopts a more hierarchical decision-making process, is of concern only to the association and its members, not the government. Indeed, the government has no legitimate business taking sides in such internal disputes, and doing so infringes upon the freedom of association by short-circuiting the internal party politics that will either lead to a compromise best suited to the particular party and its members or that may prove the dispute to be intractable and hence lead to new associations.

Applied to this case, these basic First Amendment principles of free association protect political parties not only in their decisions of *who* to support for office, but also in their chosen methods for making those decisions within the parties. Under those principles, the First Amendment rights of the party leadership and the party rank-and-file are not in tension at all, but are in fact two sides of the same coin. In choosing to associate with a party, members take the existing association as it is, and if they find aspects of the association not to their liking, they are free to work within the party to change things, whether it is the leadership structure, the method of choosing candidates to support, or elements of the party platform. Failing that, they are free to accept the good along with the bad or to seek out different associations with which their

views are more compatible. That is the full extent of the associational rights of individual party members or party factions given that any protected association with a party must be *free* association, meaning freely chosen not merely by the potentially dissenting individuals, but by the remainder of the association as well. For the party itself to deny individual party members a particular degree of say in party affairs does not deny them any *rights* whatsoever, but merely denies them their *preference* on a disputed matter of internal policy. While the Constitution protects the right of such individuals to seek associations more to their liking, it hardly compels other similarly free members of the party to accommodate such dissenting desires.

The central assumption of the court below, that the rights of the party rank-and-file are somehow in conflict with the rights of the party leadership or the party as an entity, thus misconceives the nature of associational rights under the First Amendment. The only rights at issue are the rights to structure an association's affairs free from government interference or compulsion and the right of individuals to associate with or dissociate from the group. But any supposed First Amendment right of the rank and file of a political association to a more "democratic" role in the affairs of an association simply does not exist. The only genuine "right" association members have is to vote with their feet, with all other rights vis-à-vis the association as a whole being simply a matter of intra-party negotiation and compromise to make the party more or less appealing to those it seeks to attract. The rights the court below was seeking to protect when it struck down the law requiring nominating conventions thus were illusory, and the court should instead have relied on the associational rights of the parties and their members simply to be free from government control over their internal decision-making processes. Those rights are both faithful to the First Amendment and are more than sufficient to strike down the law mandating the use of nominating conventions.

At base, a political party is nothing more than a private association of individuals who choose to collectively take positions on political issues generally, and on candidates for office in particular. Nobody is forced to join a political party, and nobody is prevented from leaving a political party. In that context of free entry and egress from a private association, the internal affairs of that association are and ought to be wholly private matters left to resolution among the members themselves in whatever manner they choose. Many such private associations may choose a majoritarian approach to resolving internal disputes over what prospective candidates the group as a body should support. Others might chose a more centralized method of leaving such decisions to party leaders.

Ultimately, however, the various members of a private association effectively endorse or reject the approach taken by their decision to remain associated with or to disassociate from the political association in question. In that way, political association is indeed free in the purest and most absolute sense that nobody is forced to associate with any particular party, and all may enter into and leave political associations at will depending on how well or poorly such associations comport with their conscience and with their perceived self-interest, taking into account both the plusses and minuses of any potential association. What neither faction in an internal dispute may do, however, is use the resources and authority of the State to tilt the scales of an internal dispute, to enforce a particular solution to that dispute, or, worst of all, to shift the blame, and hence the political responsibility, for the resolution of such dispute to the State, thus short-circuiting the intra-party political process through the supervening power of the State.

II. The Progressive Incorporation of Political Parties into the State's Election Machinery Provides No Constitutionally Sufficient Justification for Dictating Internal Party Procedures.

The main difficulty with the parties-as-private-associations approach described above is the unavoidable fact that many States, including New York, have effectively incorporated the major political parties into their election processes by making them the primary gatekeepers of ballot access in partisan elections. In such a gatekeeping role, party selection of candidates to be placed on the general election ballot does seem to involve state action so as to make party nominee selection processes less-than-wholly-private affairs. Indeed, such intertwining of party and government processes is precisely what has driven this Court to apply various constitutional limitations to the conduct of partisan primaries. *See California Democratic Party* v. *Jones*, 530 U.S. at 573 (discussing *Smith* v. *Allwright*, 321 U.S. 649 (1944) and *Terry* v. *Adams*, 345 U.S. 461 (1953)); *Torres*, 463 F.3d at 185-86 (discussing *Classic* and *Terry*).

In light of such entanglement between the private functions of the parties and the public functions of the government in regulating elections and ballot access, States would indeed seem to have significant interests in regulating related party conduct as well. But appearances can be misleading in this context insofar as the States generally *compel* parties to play such a gatekeeping role and hence asserting a state interest in regulating such gatekeeping functions begs the question whether forcing private associations into governmental roles is compatible with the First Amendment, particularly where the role likewise forces them to sacrifice essential aspects of their freedom of association.

From a private-association perspective on political parties, of course, the decision to nominate a candidate for office is in fact little more than a decision formally to endorse a prospec-

tive candidate. It has no power or significance beyond its expressive and persuasive significance, and does not in and of itself have any legal consequence. An endorsement, without more, does not get a candidate on a ballot, though it certainly indicates that the candidate is likely to be able to fulfill any neutral criteria for ballot access. Where the private association perspective gets difficult is in connection with the wholly distinct state decision to use party endorsement as a proxy for its own responsibility for regulating ballot access. Giving legal effect to a mere party endorsement by converting such an endorsement into the controlling factor for ballot access in effect delegates the State's power of controlling ballot access to private associations, which then in turn is used to justify greater state regulation of those private associations until the distinction between public and private actors is so blurred that the First Amendment begins to lose meaning.

While a State may certainly have *valid* interests in seeking to free-ride on the activity of private associations in making the State's own ballot access decisions and to narrow the field to serious contenders, those interests do not justify imposing the further burden on free association of then interfering with the internal processes of such associations. Rather, to the extent that political parties are deemed inadequate to meet the State's interests in winnowing the field in an appropriate manner, the State is free to adopt alternative methods of regulating ballot access that do not rely on party processes, but it is not free to strip parties of their private character and remake them in the State's preferred image.

Amici recognize, and both parties cite, this Court's decision in *American Party of Texas* v. *White*, which states that "[i]t is too plain for argument * * * that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." 415 U.S. 781. With respect, *amici* believe that such proposition is by no means "too plain" for argument and

that it ultimately begs the question why parties, rather than candidates, are the proper units of ballot access, or why two prospective candidates with more than enough support to be serious contenders can be excluded from appearing simultaneously on an election ballot merely because they are members of the same political party.[2]

But, even assuming that a State can legitimately force candidates to run a party gauntlet (or abandon party affiliations entirely and run as an independent) in order to gain access to the general election ballot, the proposition that a party can be limited to a single slot on the ballot for each office merely justifies requiring parties to *make* a choice, not controlling the *manner* in which such a choice is made. If the State feels that party decision-making is too restrictive of candidate access, it is certainly free to make access to the general ballot easier and less party-dependant. That is by far a less restrictive alternative to any legitimate state interests. But having forced the parties into a gatekeeper role, any dissatisfaction with how they perform that role is a self-inflicted wound that does not justify restricting party First Amendment rights in lieu of having the State directly set party-neutral ballot-access rules for the general election. [3]

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[2] Such skepticism is particularly apt where a single party is effectively the "only game in town," as is apparently the case in various parts of New York, and hence the only serious competition in an election would come from members of the same party rather than from a different party.

[3] One, though not the only, solution, would be to have non-partisan ballots. Political parties would, of course, remain free to endorse whichever candidates they desired, and to assist such favored candidates in getting a place on the ballot by, for example, collecting the necessary signatures to petition onto the ballot, but their decision of who to endorse would return to the wholly private function that it should be, separate and apart from the government's requirements regarding ballot access. And insofar as a State continued to prefer a two-step process for winnowing the field, non-partisan open primaries with an eventual run-off are ready solutions.

Any further purported interests in preventing party splitting or minimizing factionalism not only involve harms that are at best speculative, but in fact are interests directly counter to the very core of free association. Using state power to hinder or discourage individuals from freely leaving existing associations and forming new ones – *i.e.*, party splitting – on its face runs counter to the freedom of association by coercing individuals to remain in existing associations and to forgo associations with others (or with a subset of their current associates) who may have a greater congruence of views. Similarly, attempting to fight factionalism by tilting the scales in favor of existing factions more likely to achieve majority status simply misconceives the whole problem of faction. Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45 (Rossiter & Kesler eds. 1999). The solution to the danger of faction was not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Far from being compelling, a desire to decrease or hobble the formation of smaller factions is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52. The proper remedy for a concern with factions is not to bind them into majorities, but rather to encourage their diversity and freedom, thereby allowing them to check each other with their conflicting efforts. The alternative of trying to suppress the phenomenon of numerous factions "by destroying the liberty which is essential to its existence," is a remedy "worse than the disease." *Id.* at 45-46.

Ultimately, the correct perspective is to recognize that a State's preference to delegate some of its election-related functions to private associations cannot be a valid justification for state intrusion into such private associations thereby converting them into arms of the State. Co-opting and control-

ling the field of effective political associations is no less an offense to the First Amendment than suppressing such associations directly.

III. This Case Provides a Reasonable First Step in Resolving the Confusion between the Private Associational Role of Political Parties and the Public Election-Related Regulatory Role of States.

While much of the above discussion is critical of this Court's past cases dealing with state action in the context of partisan primaries, this case does not require the Court to revisit such matters at this time. Rather, it provides a limited opportunity to take a narrow step in reemphasizing the primarily private associational character of political parties by affirming the decision to strike down New York's law requiring parties to use nominating conventions but then vacating the injunction requiring parties to use primaries and remanding for further consideration.

Because the existing statute is unconstitutional not because of its putative impact of the rights of the rank-and-file as opposed to the party leaders, but because it treads on internal party decision-making, the law requiring nominating conventions should be struck down. But because, as a general proposition, the choice of nomination method should be left to the parties themselves, rather than to the State – much less to the courts – the remedy adopted by the district court was inappropriate. Rather than enjoin, through its own authority, the parties from selecting candidates through a convention, the court should have inquired whether, absent he mandatory convention scheme, any provision of state law *required* a primary. While the court below at one point suggested that New York law would require such a result, it said so only as indirect and speculative support of the injunctive authority of the District Court to order that result. The court should instead have inquired into the positi on of the New York authorities regarding whether such a result was in fact mandatory in

the context of judicial elections – a question that at least seems debatable. If such a result is not mandatory under New York law, the method of choosing candidates should be left to the parties themselves, with the State of New York deciding whether such nomination methods are sufficient to garner a place on the general election ballot. If a primary is instead deemed to be the mandatory default requirement in the absence of required conventions, then the parties to this case should be allowed to raise or defend against any further questions and challenges to the constitutionality of that mandatory default procedure, consistent with the First Amendment principles discussed above.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Second Circuit should be affirmed in part on other grounds as to the legality of New York's convention-mandating statute, and vacated in part and remanded as to the appropriate remedy.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,
Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR THE CITY OF NEW YORK, NEW YORK STATE BAR ASSOCIATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, AND FUND FOR MODERN COURTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 9

ARGUMENT 13

I. NEW YORK'S JUDICIAL NOMINATING SYSTEM IS UNCONSTITUTIONAL. 13

A. Petitioners Improperly Seek To Apply A Bright-Line Formalistic Analysis To An Area Of Law Where There Can Be No "Litmus-Paper" Test. 13

B. The Severe Burdens On Voters' And Candidates' Rights Result From Operation Of State Election Law, Not Internal Party Rules, And Thus The Associational Rights Of Party Members Are Supported By Invalidation Of The State Election Law Provisions. 18

II. THE PROVISIONAL REMEDY OF DIRECT PRIMARY JUDICIAL ELECTIONS FELL WELL WITHIN THE REASONABLE DISCRETION OF THE DISTRICT COURT. 21

A. The Federal Courts Have Broad Discretion To Shape Equitable Remedies In Election Law Matters. 23

B. The District Court's Temporary Remedy Was Not An Abuse Of Discretion..... 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

American Party of Texas v. White, 415 U.S. 767 (1974) 15-16

Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany, 357 F.3d 260 (2d Cir. 2004) 23

Ayotte v. Planned Parenthood of N. New England, 126 S. Ct. 961 (2006) 27

Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967) 24

Brown v. Chote, 411 U.S. 452 (1973) 24

Bullock v. Carter, 405 U.S. 134 (1972) 15

Coalition for Education in District One v. Board of Elections of N.Y., 495 F.2d 1090 (2d Cir. 1974) 24-25

Cousins v. Wigoda, 419 U.S. 477 (1975) 19

Democratic Party v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) 19

Flagg Brothers v. Brooks, 436 U.S. 149 (1978) 21

Goosby v. Town Board of Hempstead, N.Y., 180 F.3d 476 (2d Cir. 1999) 24

Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) 24

Jenness v. Fortson, 403 U.S. 437 (1971) 15

Lemon v. Kurtzman, 411 U.S. 192 (1973) 23

Lubin v. Panish, 415 U.S. 709 (1974) 15

Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) 24

Morse v. Republican Party, 517 U.S. 186 (1996) 20-21

New York v. United States, 505 U.S. 144 (1992) 12

Republican Party v. White, 536 U.S. 765 (2002) 12

Reynolds v. Sims, 377 U.S. 533 (1964) 22, 25-26, 28

Rockefeller v. Powers, 78 F.3d 44 (2d Cir. 1996) 27

Smith v. Allwright, 321 U.S. 649 (1944) 16

Storer v. Brown, 415 U.S. 724 (1974) 15

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 15

Terry v. Adams, 345 U.S. 461 (1953) 16

United States v. Classic, 313 U.S. 299 (1941) 16

Vieth v. Jubelirer, 541 U.S. 267 (2004) 15

STATUTES

N.Y. Elec. Law § 6-106 (McKinney 1998) 19

N.Y. Elec. Law § 6-110 (McKinney 1998) 27

N.Y. Elec. Law § 6-124 (McKinney 1998) 19

N.Y. Elec. Law § 6-134(3) (McKinney 1998) 19

N.Y. Elec. Law § 6-134(4) (McKinney 1998) 19

N.Y. Elec. Law § 6-136(2) (McKinney 1998) 19

N.Y. Elec. Law § 6-158(5) (McKinney 1998) 20

N.Y. Elec. Law § 6-160(2) (McKinney 1998) 13

OTHER

Mark H. Alcott, Testimony before New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices (*(January 8, 2007)..... 4

Michael A. Cardozo, Testimony before New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (January 8, 2007)..... 2

Victor A. Kovner, Testimony before New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (January 8, 2007)..... 7

Committee on State Courts of Superior Jurisdiction, *A Proposal to Restructure the Judicial District Nominating Convention*, 32 RECORD OF THE ASSOCIATION OF THE BAR THE CITY OF NEW YORK 615 (1977) 5, 12

Fund for Modern Courts, Inc., *Judicial Elections in New York* 86 (October 1984)..... 7

Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (December 2006) 5, 6

Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (October 2003) 5

New York State Bar Association, *A Model Plan for Implementing New York State Bar Association's Principles for Selecting Judges* (May 14, 1993) 3

INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are the City of New York and three of the leading bar associations and institutions in New York State that for long have recognized and publicly reported upon the many severe shortcomings of the present judicial selection system for trial court judges in New York State.

The ***City of New York*** (the "City"), the largest city in the United States with more than 8 million residents, has more cases pending in the New York State court system than any other entity: More than 6,000 cases are commenced annually against the City in state supreme court, and more than 25,000 such cases are currently pending. The City is a party to more than 20% of all civil cases pending in the state courts located in the City. The Office of the Corporation Counsel represents the City in all of these litigations. As the most frequent litigant before the state supreme court, the City has a vital interest in the quality and independence of the state bench.

The City and its citizens have suffered as a result of the state's current judicial selection system, which, as the courts below found and the City believes, is unconstitutional. In the past several years, three Supreme Court justices in the City have been indicted, two convicted, at least four removed

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. The parties, with the exceptions of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Clerk of this Court giving blanket consent to the filing of all *amicus curiae* briefs in this case. Written letters of consent from the New York County Democratic Committee and the Attorney General of New York have been filed in the Court with this brief.

from the bench for improper conduct, and several others disciplined for improper behavior. At the same time, qualified judges in the City have been denied promotion for refusing to kowtow to political bosses, and judicial nominations have been made on the basis of friendships with district leaders rather than merit. All of this has eroded public confidence in the state judiciary, and affected litigants, including the City, before the state Supreme Court.

New York City Mayor Michael R. Bloomberg has made judicial selection reform one of his top priorities, and has repeatedly emphasized the importance of a fair and impartial judiciary. As the Mayor said last year about this case: "The federal court's . . . ruling validates what we have been saying for years: the backroom process for nominating judges is unconstitutional and it has to stop." Remarks of Michael R. Bloomberg, Citizen's Union Awards Dinner (Oct. 24, 2006).

As a policy matter, the City supports a state constitutional amendment mandating appointment rather than election of judges, and opposes open judicial primary elections. But because such a constitutional amendment could not take effect for several years, the City supports legislative reform of the convention in the short-term and has drafted legislation reflecting its proposed reforms. "The good solution, and in fact the best [legislative] solution today, is to reform the convention system, and to do it now. . . . *without* the need for open primaries." Michael A. Cardozo, Testimony before the New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (Jan. 8, 2007).

The New York State Bar Association (the "NYSBA"), founded in 1876, is the oldest and largest voluntary state bar organization in the nation, with a membership of more than 70,000 lawyers representing every town, city and county in the state. Many notable Americans have contributed to the

NYSBA's 130-year history, including U.S. Presidents Grover Cleveland and Chester A. Arthur, as well as United States Supreme Court Chief Justice Charles Evan Hughes, who served as a president of the NYSBA.

Since its inception, the NYSBA has played a key role in supporting a state judicial selection system that requires judges to be selected because of their professional, not political, credentials. For more than 30 years, the NYSBA has maintained and reported that the current system, in which judicial candidates are nominated by delegates at political conventions, is undemocratic and that true reform is necessary. In 1993, the NYSBA approved a "Model Plan" setting forth the details of a proposed appointive selection system that is similar to the method used for selecting judges to the New York Court of Appeals. *See* New York State Bar Association, *A Model Plan for Implementing the New York State Bar Association's Principles for Selecting Judges* (May 14, 1993). Again in January of this year, the NYSBA crafted a comprehensive package of legislation that would amend the state constitution to allow for an appointive selection process for selecting New York State judges, together with an interim bill that would reform the current party convention system until such time as a constitutional amendment would pass.

Long cognizant of the failures and infirmities of the current judicial selection system in New York, the NYSBA concluded in a report approved by the House of Delegates nearly 15 years ago: "The defects of New York's present system of 'electing' judges are well known. In reality, New York's electorate does not participate in the process. Nominees of the major political parties for the Supreme Court are at present chosen in conventions tightly controlled by party leaders. Party loyalty, not ability, is the primary prerequisite for nomination." *Id.* at 1.

At the same time, the NYSBA has warned against a system of direct party primaries in place of party conventions as a cure "worse than the disease" – a system that would lay bare the

> prospect of judicial candidates promising in advance how they will decide politically-charged cases, or at least being pressured to do so by special interest groups, and negative advertisements attacking judicial candidates for their real or imagined positions on hot-button issues. . . . Can you imagine the effect on our legal system if judges were thought to make rulings based on campaign promises, or for that matter, in violation of campaign promises? . . . A judge's actions must be guided by the rule of law, not by popular opinion or special interest groups.

Mark H. Alcott, Testimony before the New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (Jan. 8, 2007).

The Association of the Bar of the City of New York (the "City Bar"), has since its founding in 1870 played an important role in reform efforts relating to judicial selection methods in New York State. Comprised currently of more than 22,000 attorneys, the City Bar has long supported a system in which state judges would be appointed by an elected executive – who would select from among a limited number of nominees approved and presented by a diverse, representative and nonpartisan commission – rather than elected. Indeed, among the chief reasons for founding the City Bar was the steady decline in judicial integrity following the state constitutional convention of 1846, which instituted the election of state judges. Throughout its 137-year existence, the City Bar has advocated reforms to root out corrupt judges, reinstate the appointive method of

selecting judges and minimize the pernicious effects of overt political activity upon judicial independence or public perceptions thereof.

As far back as nearly 30 years ago, the City Bar concluded that "[u]nder the present judicial selection system, delegates to the judicial convention generally do as they are told by the political leaders who select them, and therefore play no constructive role in the judicial selection process. Because the judicial conventions are so large, there is no hope that they can function as a deliberative assembly, and there is no one to blame for improper nominations." Committee on State Courts of Superior Jurisdiction, *A Proposal to Restructure the Judicial District Nominating Convention*, 32 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ("THE RECORD") 615 (1977). The Committee concluded "that the convention system is a hindrance, as it is now constituted, to any meaningful role by the electorate." *Id.* at 616.

Similarly, less than four years ago and again last year, the City Bar concluded in comprehensive reports that a commission-based appointive system should be instituted whereby state judges would be selected by an appointing authority from among a limited number of candidates rated as "most qualified" by truly independent judicial screening commissions – and, until such time as a constitutional amendment can be passed to effectuate such a system, genuine legislative reform of the party convention system should be initiated to ensure more deliberative and democratic choices. *See* Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (December 2006) ("2006 Report"); Judicial Selection Task Force, *Recommendations on the Selection of Judges and the Improvement of the Judicial System in New York* (October 2003).

The City Bar also warned that "primary elections by themselves (i.e., without a convention system and without public financing) are far from the best constitutional solution for the shortcomings of the current convention system. To the contrary, primary elections engender a host of problems that render such elections undesirable as a means of providing to the electorate a diverse slate of the highest caliber candidates to fill the positions of Supreme Court justices" and raise a "substantial concern" relating to "the necessity for candidates without party backing to raise large sums of money to mount competitive campaigns." 2006 Report at 21.

The Fund for Modern Courts ("Modern Courts") is a private, nonprofit, nonpartisan organization dedicated to improving the administration of justice in New York State. Led by concerned citizens, prominent lawyers and leaders of the business community, Modern Courts is the only organization in New York State devoted exclusively to improving the judicial system. It was founded in 1955 specifically to advocate changes in New York State's judicial selection processes, and has remained steadfast in its efforts to change these processes to strengthen judicial independence and quality, even as its mission has broadened to include other critical issues of judicial administration.

Modern Courts has played a role in every significant judicial reform effort in New York State in the last fifty years, including the creation of New York's Judicial Conference, the 1961 amendment to the State Constitution that reorganized New York's court system, and the creation of New York's Commission on Judicial Conduct. In the area of judicial selection, Modern Courts has studied different selection processes and issued several key reports on the effects of such processes on voter participation in, and financing of, state judicial elections.

Modern Courts has long supported a state constitutional amendment that would establish a commission-based appointive system for judges in New York State in place of the current system of judicial elections. As an interim, alternative legislative reform until such constitutional change can be effectuated, Modern Courts favors, within a framework of an elective system for state judges, a modified party convention system that would allow state court judges to be nominated for the general election ballot by their parties pursuant to fair, deliberative and democratic procedures, following non-binding evaluations of judicial candidates by independent judicial qualification commissions.

More than twenty years ago, as it advocated for commission-based judicial appointments, Modern Courts summed up what it had learned in studying the election process for New York State trial court judges: "[T]he selection of Supreme Court justices in New York is, by and large, a process controlled not by the voters but by political leaders, largely unaccountable to the citizens of New York." Fund for Modern Courts, Inc., *Judicial Elections in New York* 86 (Oct. 1984).

Nevertheless, while decrying the current party convention system, Modern Courts also has warned consistently against direct party primary elections in place of party conventions. As Modern Courts testified earlier this year: "We deeply believe that direct nominations through party primaries threatens to undermine confidence in the administration of justice by the public, which overwhelming[ly] believes that campaign contributions have an effect on judicial decisions." Victor A. Kovner, Testimony before the New York State Senate Judiciary Committee, Hearing: *Selection of New York State Supreme Court Justices* (Jan. 8, 2007).

* * *

All four *amici*, therefore, in their policy and advocacy work favor a constitutional amendment to institute a commission-based appointive system for state court judges in place of elections. Absent a state constitutional amendment, however, *amici* support a legislatively reformed party convention system to curb the abuses of the current party boss-driven judicial selection system. *Amici* oppose direct, contested primary elections for judicial candidates because of the deleterious effects that contested primary elections could have upon the administration of justice and upon the state judiciary – due in no small part to the resulting reality that the cost of judicial campaigns would increase dramatically and judicial candidates would have to raise substantial funds to become viable candidates.

Amici do not agree that affirmance of the decision below would mean that all party conventions are unconstitutional. Petitioners have set up and repudiated a straw man argument – that, according to the decision below, party nominating conventions to select candidates for judicial (or any other) office are necessarily unconstitutional if their outcomes do not replicate the unmediated preferences of rank-and-file party voters. Indeed, as noted, *amici* as a policy matter prefer party conventions, properly constituted, over direct primary elections for state judges. Nevertheless, *amici* believe that the court below correctly analyzed the present system for judicial nominations in New York State and concluded that it unconstitutionally burdens the rights of voters and candidates. *Amici* also believe that the courts below acted within their equitable discretion in enforcing the statutory default mechanism of direct primaries as provisional relief until the legislature enacts a permanent remedy to address the constitutional defects of the current statutory scheme for electing state supreme court justices.

SUMMARY OF ARGUMENT

As a legal matter, the current statutory scheme fails to meet basic federal constitutional requirements because it severely burdens the rights of voters and candidates for state judicial office. As a policy matter, the current system results in the worst of all worlds: New York State effectively has an appointive system in the guise of an electoral system, but an appointive system of the worst kind – a system in which judges are appointed by party leaders who are unaccountable to the public and who base their choices on political loyalty and party credentials, rather than on professional judicial qualifications.

1. The district court was correctly led by an extensive factual record and statutory analysis to conclude that New York State's current system of nominating state supreme court justices – viewed in totality and in light of the practical effects of the scheme as a whole – operates to restrict meaningful voter choice, and that the system overall imposes severe burdens on voters', party members' and candidates' rights. Petitioners do not challenge the district court's detailed factual findings in this Court. Instead, they seek to granulize the elements and the operation of the state statutory scheme to a point of abstraction. They argue that New York has mandated a two-step primary election system for judicial candidates – a primary election for delegates, followed by a delegate-based party convention which selects the party's judicial candidate – neither step of which, they argue, when viewed in isolation violates or burdens constitutional rights. By seeking to decouple the two-step party selection process and the web of associated statutory provisions into a "network of facially innocent provisions," Brief for Petitioners New York County Democratic Committee, *et al.* ("NYCDC Pet. Br.") 23 (quoting Pet. App. 44), Petitioners disregard the great body of this Court's precedents.

First, in its long line of election law cases, this Court has made clear that it must not, in assessing the potential burdens of election laws on voters or candidates, engage in formalism, but instead must consider the cumulative, practical effect of the totality of statutory provisions and electoral stages. The constitutional deprivations found by the courts below are the result of many overlapping aspects of the existing delegate primary and nominating convention system – each of which stage was found by the district court to operate in practice as a sham. The combined effect of all aspects of the existing selection system is that "party leaders, rather than the voters, select the Justices of the Supreme Court." Pet. App. 183a. Petitioners' formalistic approach to constitutional analysis in this area, which would require the Court to disaggregate and view in isolation the various interrelated components of the judicial selection system in New York, has long been rejected.

Second, in emphasizing the associational rights of political parties to choose candidates without interference from courts, Petitioners disregard that the delegate-based party convention at issue here burdens rank-and-file party members' associational rights. Such burdens are not the product of private, internal party rules and procedures, but instead are the product of state statute. It is state law that defines in detail and facilitates the burdensome methods for electing delegates to the party conventions, and that governs the timing of the party conventions relative to the delegate elections (and thus the time available for judicial candidates to seek to influence delegates). State law *mandates* a delegate election followed by a delegate convention, and the procedures for both, thereby *precluding* party members from setting forth their own mechanisms for selecting party nominees. The court below properly supported the associational rights of rank-and-file party members by invalidating the state election law provisions governing party nominations of state supreme court justices.

2. In light of the substantial burden on voters', party members' and candidates' rights placed by New York's statutory procedures for judicial selection, the district court properly enjoined operation of the judicial nominating convention system. Although *amici curiae* as a policy matter oppose primary elections for state supreme court justices as an interim or permanent remedy, the district court acted within its equitable discretion in ordering this form of provisional relief. Recognizing correctly that the choice of a permanent remedy falls in the first instance to the state legislature and not the courts, the district court acted well within its broad discretion when it ordered that the existing statutory mechanism in place governing party nominations of other state judges and public officers – direct primary elections – should govern nominations for state supreme court justices until such time as the legislature can act, and then stayed this temporary remedy until the election cycle beginning in 2007. (The district court then stayed imposition of the provisional remedy again through 2007 following grant of certiorari by this Court.)

In affirming the injunction and temporary remedy, the court below specifically asked the legislature's leaders for their anticipated timeframe for enacting a permanent remedy to the system for nominating trial court judges in New York, and received assurances that the legislature would be acting promptly. Reversal of the decision below would impede voters' ability to effectuate legislative reform of the current system. As long as the principle of elections is in place without meaningful rank-and-file party and voter participation, the shortcomings of a judicial election system are insulated from review and blocked from appropriate voter scrutiny. Because the current statutory scheme disguises a system of party-controlled appointments as an electoral system, some of the most pernicious aspects of any system of judicial elections – the injection of pure politics into the judicial process – are hidden from the electorate

because the give-and-take and horse-trading of politics occurs behind closed convention doors among or on behalf of party faithful, rather than through more transparent and deliberative public exchanges. While political excesses of the elective judicial system continue, the public is insulated and less energized to press for reform of judicial elections overall, thus leaving the "principle of elections in place while preventing" meaningful voter participation. *Republican Party v. White*, 536 U.S. 765, 788 (2002). As a result, voters are burdened in their ability to seek democratic reform of the system through ordinary legislative and political channels. As the City Bar stated in its 1977 report: "The principal evil perceived by the Committee with the judicial convention system is a lack of accountability and responsiveness. . . . There is, therefore, no hope that an improper nomination will lead to a reaction that will have a direct future impact on judicial selection." 32 THE RECORD at 616.

Amici curiae submit that "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the [constitutional] rights that attach to their roles." *Republican Party*, 536 U.S. at 788 (internal quotation marks omitted) (alteration in original). Central to this principle is the notion of accountability. If a state chooses to require elections for a particular office, then it may not impair the constitutional rights of voters in the name of insulating candidates from the effects of the elective process. Otherwise, as this Court noted in a different context involving federalism concerns, the state could "avoid being held accountable to the voters for the choice" of the system, impeding democratically enacted reform of that choice. *New York v. United States*, 505 U.S. 144, 182 (1992).

ARGUMENT

I. NEW YORK'S JUDICIAL NOMINATING SYSTEM IS UNCONSTITUTIONAL.

A. Petitioners Improperly Seek To Apply A Bright-Line Formalistic Analysis To An Area Of Law Where There Can Be No "Litmus-Paper" Test.

Under this Court's precedents, the courts below properly looked to the operation and practical effect of the statutorily mandated judicial selection system to conclude that it is unconstitutional. As the district court found, the cumulative impact of manifold state law provisions ensures that none of the three steps in the election process for state supreme court justices is meaningful: neither of the two steps of the primary process (delegate elections or the delegate conventions), nor the general elections.

With respect to the first step – the primary election for delegates to the judicial nominating convention – the courts below found that approximately 90% of the time there is no primary election at all because the party leader's slates of delegates and alternates are the only ones filed and so are "deemed elected" without appearing on the primary ballot. Pet. App. 18a; N.Y. Elec. Law § 6-160(2). Similarly, the next step, the nominating convention, was found to be *pro forma* rather than the theoretical construct of deliberative democracy among elected delegates so rhapsodically portrayed by Petitioners. More than 96% of judicial nominations have been uncontested at the party nominating convention, Pet. App. 22a, and the convention itself frequently has a duration of no more than twenty minutes, Pet. App. 129a & n.25. From 25% to 70% of judicial delegates are absent from the convention, Pet. App. 23a, 104a n.8, which is remarkable given that the only role for which delegates stand "election" in the party primaries is to

attend that one convention. Finally, there rarely are contested general elections for state supreme court judges, the final step of the statutory election scheme for state supreme court justices. Pet. App. 23a, 129a-130a. "[B]ecause one-party rule is the norm in most judicial districts" according to "empirical evidence," "the general election is little more than ceremony." Pet. App. 23a.

In the face of the uncontested, extensive factual findings by the district court, Petitioners ask this Court to view the judicial selection system in New York pursuant to its constituent statutory components, and to analyze each step to determine whether each provision viewed in isolation substantially and unconstitutionally burdens the rights of voters and candidates. In particular, Petitioners argue that the district court and court of appeals improperly considered the combination of the New York statutory provisions governing primary elections of delegates, together with the provisions applicable to party convention for elected delegates, to conclude that a challenger judicial candidate lacking the support of party leadership would be severely burdened in her ability to run her own committed delegates in district primaries or to obtain the party nomination by influencing the votes of elected delegates at the convention.

Instead, Petitioners argue that each stage of the two-step nominating process – the primary election of delegates by rank-and-file party members, followed by the party nominating convention of judicial candidates by elected delegates – should be analyzed separately. Because, they contend, the primary election does not itself severely burden potential delegate candidates in their access to the primary ballot, there is no constitutional infirmity. Similarly, because any judicial candidate has access (and the theoretical ability) to influence delegates to the convention once freely elected, the candidate's and voters' rights are not violated if the state

chooses to channel voter preferences through duly elected delegates.

This Court has rejected such formalism, however, and repeatedly has held that statutory electoral laws are invalid that, in their "combined effects," have the practical effect of severely burdening voters' or a candidate's rights absent narrow tailoring to serve compelling governmental interests. *Storer v. Brown*, 415 U.S. 724, 726-727 (1974) (striking down various provisions of California ballot access laws for independent candidates). There is "no litmus-paper test for separating those [election law] restrictions that are valid from those that are invidious" under the Constitution. *Id.* at 730. Instead, decision in this area "is very much a matter of degree, very much a matter of considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Id.* (quotations omitted). *See also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213 (1986) (quoting *Storer*). The Court makes "pragmatic or functional assessment[s]" of the actual and realistic burdens of an electoral scheme on voters, rather than focusing on theoretical constructs. *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring).

Thus, "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972) (striking down candidate filing fee as a condition to having name placed on primary election ballot); *see Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974) (looking to the "realities of the electoral process" in noting that "access" via write-in votes "falls far short of access in terms of having the name of the candidate on the ballot"); *Jenness v. Fortson*, 403 U.S. 437, 438-439 (1971) (noting practical effect of challenged election law provision, as opposed to the "merely theoretical"); *accord Amer. Party of Tex. v. White*, 415 U.S.

767, 783 (1974) ("access to the electorate [must] be real, not 'merely theoretical'") (citation omitted).

In one of its earliest pronouncements in this area, *United States v. Classic*, 313 U.S. 299 (1941), the Court considered whether the right of qualified voters to vote in a primary and to have their ballots counted is a right secured by the Constitution so as to fall within the scope of a Louisiana criminal provision. Rejecting formalism, the Court looked to the "practical operation of the primary law," *id.* at 313, and noted that interference with the right to vote in the Democratic congressional primary was "as a matter of law *and in fact* an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result," *id.* at 314 (emphasis added).

Similarly, as the Court earlier had invalidated a party rule requiring the exclusion of black voters in party primaries, *see Smith v. Allwright*, 321 U.S. 649 (1944), the Court subsequently, in *Terry v. Adams*, 345 U.S. 461 (1953), refused to focus on formalities when it invalidated a "three-step" election process (consisting of a "two-step" primary process, together with general elections) that was designed to exclude black voters. The three steps consisted of a party's entirely private and exclusionary primary election, followed by an official state primary election, and then a general election. The Court rejected the "attempted distinction between the 'two-step' exclusion process . . . and the 'three-step' exclusion process" as too "slight a change in form" to have constitutional significance in light of the practical impact of the scheme as a whole. *Id.* at 465 n.1.

Likewise, here, New York has a "two-step" primary process – a primary election for delegates and then a party nominating convention comprised of delegates – combined

with a third step of general elections. The constitutional deprivations found by the district court are the result of many restrictions permeating the existing statutory nominating convention system as a whole, including the large number of Assembly Districts in each judicial district (at least nine and as many as 24), the large number of signatures required for delegate designating petitions in each judicial district (as many as 36,000), the brief time period (37 days) in which delegate designating petitions may circulate, the rules regarding who may sign and witness delegate petitions, the prohibition on party members' signing more than one delegate designating petition, the brief statutory time period (less than three weeks) between the election of delegates and the judicial conventions, the absence of any right by candidates to address delegates, the lack of a mechanism for delegates to signify on the ballot their allegiance to candidates, and the high percentage of general elections that are uncontested or uncompetitive.

It is through the cumulative effect of all of these aspects of the existing convention system that rights of voters and candidates are burdened such that the "party leaders, rather than the voters, select the Justices of the Supreme Court." Pet. App. 183a. The party leaders' control of the "opaque, undemocratic selection procedure" is infused into each step of this process – from the "uniquely burdensome" method of electing delegates, through the "insurmountable . . . structural and practical impediments" that prevent lobbying of delegates once they are elected, through the nominating conventions that are "brief, rote, formal stamps of approval given to decisions made elsewhere" and finally to the general elections that "play almost as minor a role in the selection of Supreme Court Justices as do the conventions." Pet. App. 95a, 100a.

The result, as noted above, *supra* at 13-14, is that none of the three steps in the election process is meaningful. Thus,

after a 13-day preliminary injunction hearing in which 24 witnesses testified and more than 10,000 pages were received into evidence, and following submission by the parties of hundreds of pages of extensive proposed findings of fact and conclusions of law as well as oral argument, the district court determined that "local major party leaders – not the voters or the delegates to the judicial nominating conventions – control who becomes a Supreme Court Justice and when." Pet. App. 95a. Under the statutory scheme, there is virtually no opportunity for a non-party-backed candidate who cannot field her own delegates to lobby or persuade fielded delegates. Pet. App. 113a-117a, 169a. "As a result, almost all Supreme Court Justice nominations in New York State are uncontested. There is no evidence of a single successful challenge to candidates backed by the party leaders." Pet. App. 131a-132a.

Petitioners' attempt to have this Court view each aspect of the scheme separately or through formalistic lenses should be rejected in light of the overwhelming factual findings concerning the practical, combined burdensome effects of New York s statutory scheme.

B. The Severe Burdens On Voters' And Candidates' Rights Result From Operation Of State Election Law, Not Internal Party Rules, And Thus The Associational Rights Of Party Members Are Supported By Invalidation Of The State Election Law Provisions.

Petitioners rely heavily upon the associational rights of parties in arguing that the courts below improperly interfered with state parties' ability to select their own party nominees for judicial office. But unlike cases in which this Court has declined to enforce state laws or actions that would contravene or interfere with internal party rules for selecting

delegates or nominees, *see, e.g., Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (rejecting operation of Wisconsin open primary law where Democratic party rule required voters for delegates to national convention to be members of the party); *Cousins v. Wigoda*, 419 U.S. 477 (1975) (party rule in conflict with state court injunction), it is state laws and procedures – not internal party rules – that have the effect of severely burdening voters' and candidates' rights.

Judicial nominating conventions in New York State are not internal party matters. Their exclusionary and burdensome aspects are the direct products of state law. Section 6-106 of the Election Law mandates judicial nominations by party conventions, providing that "[p]arty nominations for the office of justice of the supreme court shall be made by the judicial district convention." N.Y. Elec. L. § 6-106. Moreover, virtually every significant and burdensome feature of party judicial nominating conventions is regulated by state law. Delegates to the party conventions must be elected in party primaries. *Id.* § 6-124. Delegates must be elected from within each assembly district, and the total number of delegates from each district must be in accord with a statutory formula. *Id.* Before an individual may appear on the primary ballot as a candidate for delegate to a party judicial nominating convention, he or she must submit to the State Board of Elections a petition containing the signatures of at least five percent of the party's registered voters within the assembly district he or she wishes to represent. *Id.* § 6-136(2). This process is complicated by a restriction that does not allow a party member to sign petitions designating or covering more than one slate of candidates. *Id.* § 6-134(3). Prospective delegates are given 37 days to collect the required signatures. *Id.* § 6-134(4). In a contested primary election, delegates have to campaign for primary votes, but state law does not allow a delegate's

preferred judicial candidate to be set forth on the official primary ballot. Pet. App. 107a.

Once elected, delegates attend the judicial nominating convention, the critical timing of which is governed by state law. By statute, judicial delegates are elected in primary elections taking place in the first two weeks of September, the judicial convention occurs in the third week of September, *see* N.Y. Elec. L. § 6-158(5), and the general election is in early November. Judicial candidates are therefore given a very small window of time during which they can attempt to persuade elected delegates to support their nominations. The statutorily-required timing of judicial conventions is relative to the general election (and thus the primary election for delegates): "A judicial district convention shall be held not earlier than the Tuesday following the third Monday in September preceding the general election and not later than the fourth Monday in September preceding such election." *Id.*

This is not a case where a party adopts a private internal rule independently of the state that is the subject of judicial scrutiny. This is a case where a party is *mandated* by the state to hold a convention, with delegates selected according to certain statutorily mandated procedures, and at a certain statutorily mandated time – all of which combine to severely burden voters' and candidates' choices.[2]

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[2] Moreover, the parties' private internal procedures within the statutory framework also are subject to constitutional scrutiny. The parties' practices with respect to their nominating conventions may be viewed as a delegated public function by virtue of the party's automatic placement of its nominees on the general election ballot, *see, e.g., Morse v. Republican Party*, 517 U.S. 186, 197-198 (1996) (opinion by Stevens, J.), or as state action by virtue of the fact that the party's convention is a heavily state law-regulated process, *see id.*

(cont'd)

The associational freedom of rank-and-file party members to select party nominees of their choosing is therefore *impeded* under the current statutory scheme. The decision below, by invalidating the state law restrictions that burden voters' choices, supports the associational rights of rank-and-file party members.

II. THE PROVISIONAL REMEDY OF DIRECT PRIMARY JUDICIAL ELECTIONS FELL WELL WITHIN THE REASONABLE DISCRETION OF THE DISTRICT COURT.

Although as a policy matter *amici curiae* do not support direct primary elections for judicial candidates, the district court's order of provisional relief – direct primary elections – is a legally appropriate and judicially restrained preliminary remedy. The district court ordered that, effective in 2007 and "until the legislature enacts a new method of electing Supreme Court Justices," Pet. App. 183a-184a, the nomination of New York State supreme court justices shall be by direct primary elections – the default party nomination mechanism that currently is in place for public officers and elective state judicial posts, unless otherwise specified. The court of appeals affirmed this provisional remedy, concluding that it was legally appropriate and that, "as a practical matter," the legislature might well act to reform the current system before primary elections might be held. Pet. App. 84a.

(cont'd from previous page)

at 267-278 (Thomas, J., dissenting), or as state action because the party conventions for state supreme court justice nominees "in practice produce the uncontested choice of public officials," *id.* at 267 (Thomas, J., dissenting) (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978) (Rehnquist, J., for the Court) (internal quotation omitted)).

In fashioning preliminary relief, the district court acted in a manner that the United States Supreme Court in similar circumstances found to be "most proper and commendable," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), because the district court: (1) recognized that the choice of a permanent remedy for the constitutional violation falls to the legislature of New York State, and not the court; (2) ordered "a temporary remedy, lasting only until the legislature enacts a new method of electing Supreme Court Justices" in recognition that the court lacks "authority to direct the legislature to take up the matter immediately," Pet. App. 183a-184a; (3) selected as its temporary remedy the least intrusive relief by utilizing an existing, applicable default judicial nomination mechanism contained within the Election Law; and (4) stayed the preliminary injunction until after the 2006 general election (and then again until after the 2007 election, following the grant of certiorari by this Court), thereby allowing the parties time for an expedited appeal, the affected candidates opportunity to prepare for an altered electoral party nomination method, and the legislature time to enact a permanent remedy.

The court below properly affirmed the provisional remedy imposed by the district court. Indeed, prior to argument of the appeal, the court of appeals solicited the views of the state legislature to ascertain how promptly it might enact legislation to address the constitutional flaws of the current nominating system, thereby potentially avoiding the provisional relief from ever having to take effect. The legislature responded that it would "move as expeditiously as necessary to devise a workable solution," and the court of appeals, affirming the temporary remedy, noted that "[w]e take it at its word." Pet. App. 84. Indeed, prior to the grant of certiorari in this case, the state Assembly and Senate already had held hearings to move promptly toward enactment of legislation, at which each of the present *amici* testified.

Although as a policy matter *amici* do not support direct primary elections for judicial candidates as a permanent remedy, the preliminary remedy of direct primaries ordered by the district court is a proper exercise of discretion until such time as new legislation can be enacted.

A. The Federal Courts Have Broad Discretion To Shape Equitable Remedies In Election Law Matters.

It is established law that "[i]n shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow." *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). Indeed, "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable." *Id.* (footnote omitted).

The courts of appeals have recognized the district courts' broad power and discretion to fashion appropriate affirmative equitable relief, particularly in time-sensitive election-related cases. In *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 357 F.3d 260 (2d Cir. 2004), the Second Circuit vacated the conclusion of the district court that it lacked affirmative power to order a special election under a new redistricting plan. The court held that the district court had broad equitable power to do so, and that when submission and approval of the new redistricting plan came too late to conduct the regular November election under the new plan, the district court should have taken the additional affirmative step of ordering a special election. *Id.* at 262-63.

The appeals court wrote: "When the court has determined that there has been a [Voting Rights Act] violation, it has the power to, and normally should, order that remedial steps be taken." *Id.* at 262 (noting further that the "federal courts' power to remedy apportionment violations [under the Voting

Rights Act] is defined by principles of equity"); *see Brown v. Chote*, 411 U.S. 452, 456 (1973) ("In the exigent [election] circumstances, the grant of extraordinary interim relief was a permissible choice."); *Goosby v. Town Bd. of Hempstead, N.Y.*, 180 F.3d 476, 483, 498 (2d Cir. 1999) (affirming remedy that ordered Town Board to adopt a proposed redistricting plan for violations of constitutional rights and the Voting Rights Act and a special election in accordance with the new plan); *Marks v. Stinson*, 19 F.3d 873, 889 (3d Cir. 1994) (upholding portion of preliminary injunction that enjoined the apparent electoral victor from exercising the authority of office even where the district would remain "without representation in the Pennsylvania Senate during the pendency of this litigation" and noting that "[i]nterim periods during which the voters of an area are without representation are inevitable" and "regrettable" in such election situations); *Griffin v. Burns*, 570 F.2d 1065, 1074-80 (1st Cir. 1978) (affirming preliminary injunction order that a new primary be held and postponing the general election); *Bell v. Southwell*, 376 F.2d 659, 665 (5th Cir. 1967) ("In this vital area of vindication of precious constitutional rights [involving voting], we are unfettered by the negative or affirmative character of the words used or the negative or affirmative form in which the coercive order is cast. If affirmative relief is essential, the Court has the power and should employ it.").

Even in situations where a court of appeals has been confronted in election matters with extraordinarily sweeping preliminary orders and noted "serious doubt whether, if any of us had been sitting as the district judge, . . . would have entered the orders here under review," the court has deferred to the district court's wide discretion in crafting preliminary relief to remedy constitutional violations. *Coalition for Educ. in Dist. One v. Bd. of Elections of N.Y.*, 495 F.2d 1090, 1093-94 (2d Cir. 1974) (affirming preliminary injunction directing that a school board election be declared invalid and the

position of the elected members be declared vacant, that a new election be held, and that the Chancellor of the City School District should in the interim exercise the powers of the previously elected board, despite concluding that an alternative remedy would have afforded "ample relief"). Such deference is "not too high a price to pay for the benefit of the greater time which a trial judge can give to a particular case and his advantage in having seen and heard the witnesses." *Id.* at 1093.

B. The District Court's Temporary Remedy Was Not An Abuse Of Discretion.

Against this backdrop of broad deference to the district courts' discretion to fashion far more sweeping interim equitable remedies than the one at issue here, the district court's provisional remedy in this case is an example of "proper judicial restraint," *Reynolds*, 377 U.S. at 586, well within the court's sound discretion, and should be upheld. *See id.* at 586-87 (upholding district court's order of a provisional and temporary reapportionment for general election that combined features of two plans enacted by the legislature, enjoined future elections under any of the invalid plans, and deferred hearing on a permanent injunction but maintained jurisdiction until the legislature, as provisionally reapportioned, would have the opportunity to enact a constitutionally permissible reapportionment plan).

Four aspects of the district court's interim relief and remedial analysis underscore its propriety.

First, the district court correctly understood that the state legislature should decide the appropriate permanent remedy to address the constitutional infirmities of the State's judicial election system. *See* Pet. App. 183a ("The choice of a permanent remedy for this constitutional violation does not fall to me, but rather to the legislature of New York State."). Thus, the court "correctly recognized" that the appropriate

permanent remedy "is primarily a matter for legislative consideration and determination, and that judicial [permanent] relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion." *Reynolds*, 377 U.S. at 586.

Second, the district court properly ordered only a temporary remedy, "prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for [a permanent remedy] which rests with the legislature." *Id.*; *see* Pet. App. at 95a ("Until the New York legislature enacts another electoral scheme, such nominations shall be made by primary election."). Indeed, once an electoral system has been found likely to be unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan," subject to "equitable considerations [that] might justify a court in withholding the granting of immediately effective relief." *Reynolds*, 377 U.S. at 585.

Third, the district court's provisional remedy was the least intrusive available option. The district court properly concluded that the existing judicial nominating convention system is constitutionally deficient as a result of several separate but interrelated provisions within the statutory scheme, including as a result of the combination of provisions operating together. The district court noted, for example, the large number of Assembly Districts in each judicial district, Pet. App. 101a, 104a, the large number of judicial delegates from each Assembly District, Pet. App. 104a-107a, the large number of signatures necessary for delegate petitions in each judicial district, Pet App. 108a, the brief time delegates have to circulate petitions, *id.*, the burdensome rules regarding eligible signatories and witnesses to delegate petitions, *id.*, and so forth.

The district court declined to make a quasi-legislative determination about how to rewrite the many provisions of this statutory scheme so that the convention system might pass constitutional muster. Instead, it enjoined the judicial nominating convention system and then ordered nominations for supreme court justices to proceed under the default system under the state Election Law requiring direct primaries, applicable to the party nominations of elected public officials and judges unless otherwise specified: "All other party nominations of candidates for offices to be filled at a general election, except as provided for herein, shall be made at the primary election." N.Y. Elec. Law § 6-110 (McKinney 1998). This reliance upon an existing statutory alternative was an appropriate and restrained exercise of equitable discretion. *See, e.g.*, *Rockefeller v. Powers*, 78 F.3d 44, 46 (2d Cir. 1996) (affirming order that enjoined onerous petition signature requirements, and fashioned a remedy based on an existing mechanism in New York law that "provides an option to political parties" to reduce the number of necessary signatures to a specified alternative).[3]

Fourth, and finally, the district court exercised judicial restraint with respect to the exercise of its remedial powers

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[3] Contrary to the argument advanced by Petitioners (NYCDC Pet. Br. 47), this case is not analogous to *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961 (2006). In *Ayotte*, "[o]nly a few applications" of the relevant statute "present[ed] a constitutional problem" and the statute itself included a "severability clause," thus making possible and appropriate a narrow injunction that did not require rewriting state law. *Id.* at 969. This Court expressly stated that courts must be "mindful that our constitutional mandate and institutional competence are limited, . . . [and] restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it." *Id.* at 968 (internal quotation marks omitted). Here, it was appropriate for the district court to impose a less intrusive remedy on a provisional basis, giving the state legislature an opportunity to consider alternative measures.

by staying the effective date of the interim remedy until after the 2006 general election, and then later until after the 2007 election. This allows time for the legislature to enact legislation before any provisional judicial remedy takes effect, and allows the judges and candidates subject to upcoming elections additional time to plan for and adjust to new electoral methods. *See Reynolds*, 377 U.S. at 585 ("With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.").

Under these circumstances, the preliminary relief ordered by the district court – while disfavored by *amici curiae* as a permanent remedy for the constitutional violation – is a legally permissible and appropriately restrained provisional remedy in light of the identified constitutional violations, well within the district court's equitable powers, and not an abuse of discretion.

CONCLUSION

The City of New York, the New York State Bar Association, the Association of the Bar of the City of New York and the Fund for Modern Courts as *amici curiae* respectfully request that this Court affirm the decision of the court below.

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In the Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, ET AL.,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF JOHN DUNNE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Theoretical Convention System Described By Petitioners Does Not Exist. 3

A. In The Voting Rights Context, Doctrine Should Not Be De-Coupled From Facts 4

B. In The Current System, It Is Impossible For A Challenger-Candidate To Compete, Regardless Of Popular Support. 6

1. Successfully Running For Justice Is Impossible. 6

2. The Office Does Not "Seek The Man"; Candidates Seek The Office Through Back-Room Deals, Rather Than Electioneering. 11

C. Running For Delegate Is Difficult And Pointless 13

II. The Current System Deprives Party Members Of Their Rights To Associate Politically. 14

A. The First Amendment Rights Of A Political Party Belong To Its Members, Not Its Self-Styled Leaders. 14

B. The Convention System Cuts Party Members Out Of The Nominating Process Altogether. 17

1. Party Members Have No Input Whatsoever Into Their Party's Nomination Process. 18

TABLE OF CONTENTS – continued

Page

2. The System Is Controlled By Entrenched Party Bosses. 20

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

CASES

Bachur v. *Democratic Nat'l Party*,
836 F.2d 837 (4th Cir. 1987) 17

Bullock v. *Carter*,
405 U.S. 134 (1972) 5

Cal. Democratic Party v. *Jones*,
530 U.S. 567 (2000) 16-17, 19

Democratic Party v. *Wisconsin ex rel. La Follette*,
450 U.S. 107 (1981) 15, 19

Eu v. *San Francisco County Democratic Cent. Comm.*,
489 U.S. 214 (1989) 15-16

FEC v. *Colorado Repub. Fed. Campaign Comm'n*,
533 U.S. 431 (2001) 6

Houston Lawyers' Ass'n v. *Att'y Gen. of Tex.*,
501 U.S. 419 (1991) 1

LaRouche v. *Fowler*,
152 F.3d 974 (D.C. Cir. 1998) 17

Lee v. *Weisman*,
505 U.S. 577 (1992) 6

Lubin v. *Panish*,
415 U.S. 709 (1974) 6

Morey v. *Doud*,
354 U.S. 457 (1957) 6

TABLE OF AUTHORITIES – continued

Page(s)

Randall v. *Sorrell*,
126 S. Ct. 2479 (2006) 26

Reynolds v. *Sims*,
377 U.S. 533 (1964) 26

Ripon Soc'y, Inc. v. *Nat'l Repub. Party*,
525 F.2d 567 (D.C. Cir. 1975) 17

Storer v. *Brown*,
415 U.S. 724 (1974) 5

Sweezy v. *New Hampshire*,
354 U.S. 234 (1957) 15

Tashjian v. *Republican Party of Conn.*,
479 U.S. 208 (1986) 15

Terry v. *Adams*,
345 U.S. 461 (1953) 5

United States v. *Classic*,
313 U.S. 299 (1941) 5

Vieth v. *Jubelirer*,
541 U.S. 267 (2004) 4, 5

STATUTES, RULES AND REGULATIONS

SUP. CT. R. 37.6 1

N.Y. ELEC. L. § 6-136(2) 8

S. 55-A, 2005-2006 Reg. Sess. (N.Y. 2006) 20-21

TABLE OF AUTHORITIES – continued

Page(s)

MISCELLANEOUS

COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (Feb. 6, 2006) 11

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Press Release, Sen. Joseph L. Bruno, Senate Passes Legislation to Amend Supreme Court Candidate Selection Process (Feb. 13, 2006) 20

Press Release, Mayor Michael R. Bloomberg, Mayor Michael R. Bloomberg Delivers Testimony Before the Commission to Promote Public Confidence in Judicial Elections (Sept. 16, 2003) 21

Wayne Barrett, *The Sales of Justice*, VILLAGE VOICE, Jan. 13, 2007 12

B. BAYANOV ET AL., SOVIET SOCIALIST DEMOCRACY 91 (F. Kalinychev trans., 1968) 11

Editorial, *Yes, Choose Judges Democratically*, BUFFALO NEWS, Feb. 1, 2006 23

Editorial, *A Turning Point For New York Courts*, N.Y. TIMES, Feb. 4, 2006 14

TABLE OF AUTHORITIES – continued

Page(s)

Editorial, *Don't Let Pols Choose Judges*, N.Y. NEWSDAY, Feb. 22, 2007 ..... 14, 24

Editorial, *Death Sentence For Boss Rule*, N.Y. DAILY NEWS, Sept. 5, 2006 24

Editorial, *Breaking Down the Clubhouse*, N.Y. TIMES, Sept. 9, 2006 23

Editorial, *Justice for Voters*, SYRACUSE POST STANDARD, Nov. 22, 2006 23

Editorial, *Court System Broken*, ROCHESTER DEMOCRAT AND CHRONICLE, Jan. 28, 2007 23

Editorial, *Last Word on Judges*, ALBANY TIMES UNION, Feb. 24, 2007 23

Linda Greenhouse, *Judge Selection To Be Reviewed By U.S. Justices*, N.Y. TIMES, Feb. 20, 2007 21

JUDITH S. KAYE, N.Y. STATE UNIFIED COURT SYSTEM, THE STATE OF THE JUDICIARY (Feb, 6 2006) 22

Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997) 26

Judge Jonathan Lippman, The Public Policy Forum: Court Reform in New York State (May 17, 2005) 22

Richard H. Pildes, *The Supreme Court, 2003 Term -- Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) 26

TABLE OF AUTHORITIES – continued

Page(s)

Tom Precious, *Spitzer Calls for Reform of Redistricting*, BUFFALO NEWS, Nov. 22, 2005 21

Joel Seigel & Michael R. Blood, *Norman's the King of the Courthouse*, N.Y. DAILY NEWS, Mar. 24, 2002 12

VITALY LATOV, THE SOVIET ELECTORAL SYSTEM (1974) 11

BRIEF OF JOHN DUNNE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*[1]

For over four decades, *amicus curiae* John Dunne has been a champion of judicial reform and independence in New York State. He is a lifetime enrolled member of the Republican Party and served as a New York State Senator from 1966 to 1989, representing the Sixth District in Nassau County. From 1990 to 1993, Mr. Dunne served as Assistant U.S. Attorney General for Civil Rights, in the administration of the first President Bush.

As a legislator, Senator Dunne was actively engaged in a series of legislative innovations to improve the courts. From 1985 to 1986, and again in 1989, he served as Chair of the Senate Judiciary Committee, his tenure interrupted by a term as Deputy Majority Leader. One of his principal efforts was passage of the legislation that converted the New York State Court of Appeals into a "certiorari" type court. Mr. Dunne's advocacy on behalf of voting rights continued during his years in the Justice Department. In 1990, for example, he argued before an *en banc* Fifth Circuit that judicial elections are covered by Section 2 of the Voting Rights Act of 1965. This Court ultimately adopted the Government's position, unanimously. *Houston Lawyers' Ass'n* v. *Att'y Gen. of Tex.*, 501 U.S. 419 (1991).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all *amicus* briefs. Written consent from the remaining parties has been filed with the Court along with this brief.

Throughout his years in public service and since leaving office, Senator Dunne has been deeply committed to working with members of both political parties to reform and modernize the judicial election system in New York. He was appointed by both Governor Pataki and Governor Spitzer to their respective statewide Judicial Screening Committees, and he currently serves as chair of the screening committee for the Third Judicial Department. In 2003, he was appointed by New York State Chief Judge Judith Kaye to serve on the New York State Commission to Promote Public Confidence in Judicial Elections ("The Feerick Commission"). As a member of that Commission, he drafted the proposal to establish mandatory state-sponsored Independent Judicial Election Qualifications Commissions. He was also the founding chair of the New York State Bar Association's Special Committee on Judicial Independence, President of the Nassau County Bar Association, and a member of the House of Delegates of both the American and New York State Bar Associations.

New York's judicial election scheme has harmed Mr. Dunne, in his capacity as a voter and a member of the Republican Party, in the same manner that it has harmed voters throughout New York: It has consistently prevented him from having any meaningful role in selecting his own party's candidates for the office of Supreme Court Justice in his home district. Instead, under New York's election system, he must sit idly by while nominees are anointed by party leaders, who frequently choose candidates based not on their popularity or qualifications for office but on their personal connections and loyalty to those leaders.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have submitted three extensive briefs to this Court, and an equal number have been submitted by *amici*

urging reversal. Not one of these submissions has even mentioned, let alone come to grips with, the *facts* of this case. Petitioners make much of what New York's judicial convention system is *supposed* to do, or was *designed* to do, but they spend precious little time examining what the system *actually* does.

The judicial convention system stands as an insurmountable barrier to qualified candidates who wish to appeal to their parties' rank-and-file members for a chance at nomination to Supreme Court justiceships. It entrenches party bosses at the expense of voters and candidates. In short, it deprives the vast majority of party members of their First Amendment rights to political association by preventing them from having any input into their party's choice of a standard bearer.

The First Amendment does protect the associational rights of political parties. But those rights belong to the *members* of political parties, like Mr. Dunne. They do not vest in party factions, whether denominated as "leadership" or anything else. When the state creates a system in which party "leaders" are privileged and the rank and file are deprived of any role whatsoever, the collective action that renders parties democratically valuable is lost. Worse still, here it is replaced by mere charade. As the courts below correctly concluded, the challenged system in this case deprives voters and ordinary party members throughout New York State of their First Amendment rights. That decision should be affirmed.

ARGUMENT

I. The Theoretical Convention System Described By Petitioners Does Not Exist.

Petitioners' arguments rely on a picture of New York's convention system that bears little resemblance to reality. Only by attempting to direct the Court's attention away from

the *facts* can petitioners possibly claim that the current system "enhanc[es] judicial independence and confidence in the judiciary." Br. of N.Y. County Dem. Comm. *et al.* ("County Br.") at 46. The system does no such thing, as petitioners are well aware.

In voting-rights cases such as this one, this Court has long adhered to the practice of making "pragmatic or functional assessment[s]" of the burdens on voters, instead of focusing on artificial, theoretical constructs. *Vieth* v. *Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring). Once this Court confronts the reality of New York's judicial election system, it will find that petitioners hide behind theory because the convention system in actual practice serves to keep voters, rank-and-file party members, and qualified candidates—in short, everyone except for entrenched party leaders—out of the judicial nomination process.

A. In The Voting Rights Context, Doctrine Should Not Be De-Coupled From Facts.

Petitioners and their *amici* insist that in assessing the constitutionality of New York's convention system, this Court should ignore the way that the system actually functions and should instead confine its analysis to a sanitized picture of the convention system that bears little resemblance to the real world. This approach is justified, petitioners claim, because in *theory*, New York's convention system is not *supposed* to function in a manner that places burdens on First Amendment freedoms. See, *e.g.*, *Amicus* Br. of Republican Nat'l Comm. ("RNC Br.") at 14 ("The state election rules have nothing to say about whether party leaders should recommend preferred candidates * * * ."). Any such burdens that come about in practice, petitioners argue, "are the result of purely private action." Br. of N.Y. State Bd. of Elections *et al.* ("BOE Br.") at 30.

There are two problems with this approach. The first is factual: As we will discuss in detail in the next section, New

York's system *is* designed to thwart the participation of voters in the selection of their party's candidates for office, and in that respect, it has succeeded handily. The second problem is doctrinal: For over sixty years, this Court has been clear that when analyzing election systems, it is necessary to investigate how those systems actually function in the *real world*, not just in theory.

This Court has been taking a "practical" approach to voting-rights cases for decades. In *United States* v. *Classic*, 313 U.S. 299 (1941), for example, this Court found that restricting voter access to Louisiana's primary was tantamount to restricting access to a general election because the primary represented "the only stage when such interference could have any practical effect on the ultimate result." *Id.* at 314. Twelve years later, in *Terry* v. *Adams*, 345 U.S. 461 (1953), this Court rejected as "formalistic" an attempt by a political "club," the "Jaybirds," to defend its racially-restrictive nominating activities against constitutional challenge by claiming it was simply a "private group." *Id.* at 466. Whether it was technically "private" or not, this Court noted, the Jaybird club's elections "ha[d] become an integral part, indeed the only effective part, of the elective process that determine[d] who shall rule and govern in the county." *Id.* at 469.

This focus on function over form continued to pervade this Court's voting-rights jurisprudence throughout the last century and into this one. In *Storer* v. *Brown*, 415 U.S. 724 (1974), for example, this Court emphasized the importance of focusing on "critical facts" in order "to assess realistically" the burden that an election law placed on candidates. *Id.* at 738. Similarly, it noted in *Bullock* v. *Carter*, 405 U.S. 134 (1972), that "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Id.* at 143. More recent cases carry this tradition into the present day: As noted above, Justice Kennedy's concurrence in *Vieth* endorses "pragmatic or functional assessment[s]" of voter restrictions; in the cam-

paign finance context, this Court has insisted on examining "how the power of money *actually works* in the political structure." *FEC* v. *Colorado Repub. Fed. Campaign Comm'n*, 533 U.S. 431, 450 (2001) (emphasis added).

In this case, this Court should resist petitioners' entreaty to ignore "[t]he realities of the electoral process," *Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974), in favor of sterile theorizing about how the system *might* or *should* work. "Law reaches past formalism." *Lee* v. *Weisman*, 505 U.S. 577, 595 (1992). "[T]o disregard practical differences and concentrate on some abstract identities is lifeless logic." *Morey* v. *Doud*, 354 U.S. 457, 472 (1957) (Frankfurter, J., dissenting).

B. In The Current System, It Is Impossible For A Challenger-Candidate To Compete, Regardless Of Popular Support.

New York's judicial election laws, by design, enable a system that deprives voters and party members of any chance to vote for candidates who have not been pre-selected by unelected party "leaders." The "delegate convention" system assures that no candidate who challenges the party orthodoxy will ever find a place on the ballot, and likewise, that no reform-minded party member or faction can possibly succeed in circumventing the choices of the "leadership."

1. Successfully Running For Justice Is Impossible.

Because of the barriers erected by state law and the consequent stranglehold the party leaders in New York have over the nominating process, it is impossible for a candidate who lacks the support of party leaders to receive—or even effectively seek—his or her party's nomination. Indeed, as the district court found, no candidate backed by party leaders has *ever* been successfully challenged for a Supreme Court nomination. PA-130a-32a.[2] And because most judicial dis-

[2] "PA-___," which is appended to the Petition for Certiorari, refers to the opinions of the Second Circuit (PA 1a-92a) and district court

tricts in the state are dominated by one-party rule (and party-leader cross-endorsement is the norm in most others), the fact that it is impossible to receive the nomination means that it is impossible for a challenger candidate to be elected Justice.

It is no wonder that a challenger candidate has never succeeded in getting a spot on the ballot: As the district court and Court of Appeals found, and as decades of experience in New York bear out, such a task would be monstrously difficult. In order to secure a nomination, a candidate would need to convince more than half the "unaffiliated" delegates in his district to vote for him at the district convention. This could be accomplished, one supposes, in one of two ways: (1) by lobbying the party-sponsored delegates directly at the convention, or (2) by attempting to stock the convention with delegates loyal to the candidate by engineering a district-wide delegate election campaign.

Lobbying the supposedly "unaffiliated" delegates is an impossibility, as the district court record makes clear. Petitioners describe the nominating conventions as Madisonian deliberative bodies—a "form[] of representative democracy," County Br. at 20, designed to vest nomination decisions with delegates "who are familiar with the values of the party membership as a whole and who can educate themselves about the qualifications of the candidates and the duties of specialized offices." Br. of Att'y Gen. of the State of N.Y. as Statutory Intervenor ("AG Br.") at 26. This description is at best naïve and at worst disingenuous. Delegate "conventions" are empty pageants: They last 20 minutes, PA-129a, and do not *ever* produce a slate of nominees that differs in the slightest from that proposed by the same party bosses who select the delegates themselves.

Indeed, the record in this case demonstrates the impossibility of attempting to lobby party-sponsored delegates. As

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(PA 93a-185a). "JA-____," refers to the Joint Appendix filed in the Second Circuit and in this Court.

the Second Circuit opinion recounts in detail, Judge López Torres tried repeatedly, in successive years, to secure an interview with the delegate screening committee, to contact the delegates themselves prior to the convention, or to address the delegates from the floor of the convention. She was rebuffed at every turn by party leaders determined to prevent her from securing a nomination. PA-120a-21a, 139a-43a.

The district court and Second Circuit focused on the prospect of running a slate of delegates because, having been locked out of the convention, a challenger's only *conceivable* way to attain a nomination is to run her own delegates. And as those courts determined, the difficulty involved in running a slate of delegates is so great as to make it an impossible option for candidates with less than unlimited resources.

A comparison is helpful to illustrate the difficulty involved. Each time Mr. Dunne stood for election to the State Senate, he needed to collect 1,000 petition signatures from fellow Republicans in his district in order to have his name appear on his party's primary ballot. N.Y. ELEC. L. § 6-136(2)(h). Other important elective offices, both state and federal, have similar petition requirements under New York law: If a person wishes to be nominated for one of New York's seats in the U.S. House of Representatives, for example, he or she needs to collect 1,250 signatures from fellow party members. N.Y. ELEC. L. § 6-136(2)(g). To run for State Assembly, 500 signatures are necessary. N.Y. ELEC. L. § 6-136(2)(i).

By contrast, a challenger candidate for a Supreme Court justiceship would, as the courts below found, essentially have to run as many as 24 separate petition drives—one for each Assembly district that comprises his or her home judicial district. As the Respondents' brief to this Court explains in detail, this would require an absolutely Herculean effort. Resp't Br. at 5-10. Within each Assembly district, the candidate would need to recruit a slate of delegate candidates, as well as candidates for "alternate" slots. Each slate of candi-

dates would need to collect a minimum of 500 valid signatures from voters who had not already signed the petitions circulated by the party leadership. Even the *smallest* judicial district in New York contains at least *nine* separate assembly districts and has at least *64* convention delegates. PA-12a. A Supreme Court candidate in that district would thus need to collect *4,500* valid signatures, on nine separate petitions, after first recruiting 64 individuals willing to run in contested races for public office simply to win the privilege of casting a vote at a district-wide convention. A candidate for Supreme Court justice in the largest judicial district—which encompasses 24 Assembly districts—would need to collect *12,000* signatures and recruit *248* candidates for delegate and alternate slots.

Even accomplishing this Sisyphean task would not guarantee a candidate a spot on the ballot. To the contrary: After successfully engineering a massive petition drive, a Supreme Court hopeful would then need to conduct dozens, or even hundreds of separate voter-outreach campaigns, in order to convince party voters to elect the dozens or hundreds of officially "un-pledged" delegate candidates whose unfamiliar names would appear on primary ballots.

This is a significantly higher barrier to entry than that erected for nearly *every* elected office in the state. A candidate for Mayor of New York City must collect only 7,500 signatures in order to guarantee himself a spot on the primary ballot; even a candidate for *Governor* has an arguably easier time: He or she must collect 15,000 petition signatures, but once that task is accomplished, his or her name, like that of the mayoral hopeful, is on the ballot. Mayoral and gubernatorial candidates, along with their colleagues running for state and federal legislative positions, city council positions, and dozens of other elective offices, are spared the considerable burden of recruiting scores of "delegate" candidates, and then, if their petition drives are successful, conducting multi-

ple voter education campaigns in order to convince party members to vote for their chosen candidates.

Given the sheer complexity of this "byzantine" process, PA-12a, it is no wonder that no challenger candidate has ever succeeded in achieving the nomination.

Petitioners attack the Second Circuit's examination of a candidate's ability to run his own delegate slates by protesting that "New York's judicial nominating system was never *designed* to permit judicial candidates to campaign directly to primary voters." County Br. at 29 (emphasis added). Rather, "candidates are *supposed* to address their campaigning to unaffiliated delegates at the convention." *Id.* at 30 (emphasis added). That such an approach has never succeeded for a challenger candidate is irrelevant, petitioners argue, because, by considering such evidence, the Second Circuit relied on a "right to win standard." *Ibid.*

But the fact that a challenger candidate has never obtained her party's nomination is all the evidence that is necessary to show that the system—working, as the petitioners remind us, as it was "designed"—denies candidates lacking party leaders' imprimatur of approval any chance to participate meaningfully.

Petitioners are correct that one need not demonstrate *success* in the political process to show that a particular group has *access* to the political process. But in New York's nominating system, which is not based on popular votes but on the votes of supposedly "unaffiliated" delegates, evidence that the delegates *invariably* favor candidates sponsored by a particular faction shows that the system is a farce. Like many artificial barriers to entry, it serves to protect a structure that does not produce results that would stand up to any kind of true competition. The petitioners' standards for what

counts as a free election are so low that they could be met by sham elections in totalitarian countries.[3]

2. The Office Does Not "Seek The Man"; Candidates Seek The Office Through Back-Room Deals, Rather Than Electioneering.

In a system where challenger candidates *never* pose a credible threat, party leaders are free to treat the office of Supreme Court Justice as a commodity to be sold in exchange for favors, donations to political committees, and even personal bribes. The Feerick Commission found that "parties 'dole out' judgeships as political patronage and * * * candidates must cater to their local political parties to have a chance at an elected position." COMM'N TO PROMOTE PUBLIC CONFIDENCE IN JUDICIAL ELECTIONS, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 20 (February 6, 2006).

Petitioners argue that the current convention system is designed to ensure that "the office should seek the man, and

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[3] Indeed, Petitioners' defense of the delegate convention system as representing a sort of democratic ideal calls to mind the arguments advanced in favor of another voting system that lasted for 75 years before being discarded. In the Soviet Union, "[a]n individual [did] not have the right to propose himself as a candidate." VITALY LATOV, THE SOVIET ELECTORAL SYSTEM 50 (1974). Instead, this onerous duty was assumed by "[p]ublic organizations and associations of working people," *ibid.*, who were "well acquainted with the people they nominate[d]," *id.* at 51, and who invariably settled on only one candidate for each open position. The one-candidate procedure was fair, Soviet political theorists explained, because "the working people and their organizations ha[d] every possibility carefully to discuss all candidates and nominate the worthiest." B. BAYANOV ET AL., SOVIET SOCIALIST DEMOCRACY 91 (F. Kalinychev trans., 1968). This Court should take a skeptical view of any system, no matter how theoretically democratic and rhapsodically defended, that somehow simply never produces a single result contrary to the will of party officials.

not the man the office," BOE Br. at 11 (quoting N.Y. State Senate, *Report of the Special Committee of Senate on Primary Law Submitted with Bill to Establish State Wide Judicial Conventions*, S. Doc. No. 34, at 2 (1918)); County Br. at 2 (quoting same), and to "advance[New York's] significant interest in ensuring impartiality" and promoting public confidence in the judiciary. County Br. at 46. Such a system is no doubt desirable, but it is not the one that exists in New York today. Although the convention system avoids primary battles requiring fundraising efforts by candidates—which could reduce public confidence in the judiciary, as the Feerick Commission noted—it is simply not the case that it prevents candidates for Justice from engaging in unseemly campaigning. While would-be Justices need not *raise* funds in their quest to join the bench, money still plays a role in judicial campaigns; candidates frequently must donate to party officials' political action committees as a quid pro quo for the leaders' support. See Joel Siegel & Michael R. Blood, *Norman's the King of the Courthouse*, N.Y. DAILY NEWS, Mar. 24, 2002. And evidence suggests that in some cases, party officials may have literally sold Justiceships to candidates for tens of thousands of dollars. See Wayne Barrett, *The Sales of Justice*, VILLAGE VOICE, Jan. 13, 2007 (alleging that Brooklyn party leader sold Supreme Court Justiceship for $50,000 in cash and $6,000 in postage stamps).

Petitioners praise the current system for its preservation of judicial independence, See AG Br. at 26; County Br. at 44; but no Justice can be independent when she owes her job to a party leader who can threaten to withdraw the party's support in future elections. Indeed, the events that gave rise to this litigation belie petitioners' claims that judges maintain their independence in the current system. When she refused to hire cronies of the party officials who had helped her become a judge, Judge López Torres was denied the opportunity to become a Supreme Court Justice, despite her excellent qualifications and immense popularity in her district.

C. Running For Delegate Is Difficult And Pointless.

Finally, faced with the fact that it is functionally impossible for a candidate to actually run for Supreme Court Justice without the support of party "leadership," Petitioners fall back on the claim that a party member may run for *delegate* with little difficulty. With respect to the primary for delegates, Petitioners contend, "the barriers to ballot access * * * are quite low." AG Br. at 28. That claim is factually incorrect, but more important, it is irrelevant to the question before this Court: whether the political association rights of party members are hampered by the State's interference with their ability to participate in the selection of their party's candidate for *Supreme Court Justice*. Running for *delegate* is not an end in itself. It is an intermediate step toward the ultimate goal of nominating a candidate for *Justice*.

Of course, running for *delegate* is no easy matter either, given the manner in which the statutory scheme privileges the small factions that control the local party apparatus. Because the party itself can field delegate candidates as a pro forma matter, "independent" delegate candidates face a huge uphill battle. A delegate candidate must educate the voters as to why his or her candidacy is superior to others'. This persuasion is inevitably burdensome because unlike delegates in many convention systems, delegates in New York are not pledged to specific candidates. Voters would have to learn a great deal about a candidate to have any idea how the candidate might vote at the convention. Most voters do not even understand the role of a delegate, as Judge Keefe of Albany explained in his declaration to the district court. JA-501 ¶ 11.

Second, for party members who disagree with party leadership, running for delegate is a pointless exercise. Even if a "challenger delegate" were to succeed in earning himself a seat at the convention, the effort would be for naught. Unless a *majority* of delegates (or at least a substantial minority) were elected in this manner, and were therefore out

from under the thumb of local bosses, maverick delegates would have no chance of actually influencing the outcome of the convention. At best, challenger delegates earn the right to be puppets in what the courts and the media have rightly characterized as a "sham." Editorial, *A Turning Point For New York Courts*, N.Y. TIMES, Feb. 4, 2006, at A12; Editorial, *Don't Let Pols Choose Judges*, N.Y. NEWSDAY, Feb. 22, 2007, at A36. That is not meaningful political association. A would-be reformer who manages to overcome the hurdles involved in becoming a delegate will be a lone dissenting voice in a chorus of conformity at the convention. This is why the lower courts were correct to focus their examinations on the efforts required of candidates for *Justice* to field a *slate* of delegate candidates: Only a group of delegates, rather than a single one, can have any influence on the ultimate selection of a nominee.

II. The Current System Deprives Party Members Of Their Rights To Associate Politically.

Petitioners' *amicus* the RNC argues that the Second Circuit's ruling "encroached on the[] established rights of political parties," which the court should have balanced against the rights of candidates and voters. RNC Br. at 2. But the RNC creates a false dichotomy. New York's election law does not empower parties at the expense of voters or candidates. The law empowers party leaders at the expense of rank-and-file party *members* like Mr. Dunne.

A. The First Amendment Rights Of A Political Party Belong To Its Members, Not Its Self-Styled Leaders.

Petitioners and their *amici* envision a free-standing First Amendment right of association belonging to political parties. But this Court's cases establishing the rights of political parties show that the parties' rights derive from the rights of party *members*. This Court has always viewed political parties' freedom of association as synonymous with the free-

dom of association of party members. Indeed, as this Court wrote fifty years ago, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957). If that is so, then a party cannot claim that its freedom is being interfered with when the interest it asserts is *contrary* to the interest of its members.

In *Democratic Party* v. *Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), this Court held that Wisconsin could not compel the Democratic Party to seat delegates at the national convention when Wisconsin state law provided for election of delegates in a manner contrary to party rules. In doing so, the Court emphasized the importance of the fact that "*the members of the National Party*, speaking through their rules, [had] chose[n] to define their associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention." *Id.* at 122 (emphasis added). New York's judicial election law does exactly what Wisconsin's delegate selection law did: It forces upon the party rank and file a system for selecting delegates to a nominating convention in a manner that prevents party *members* from making their own rules and expressing their own choices.

In its *amicus* brief supporting the petition for certiorari, the RNC alleged that "recognized associational rights of parties *qua* parties" include the ability of "party leaders [to] organize the rank-and-file, set goals, and endorse candidates." Cert. Pet. *Amicus Curiae* of Republican Nat'l Comm. at 17. But the two cases cited to support this proposition both concern the rights of party *members*, not their self-styled leaders. In *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986), the Court struck down a state law forbidding parties from letting independents vote in party primaries because the law "impermissibly burden[ed] the rights of [*party*] *members* to determine for themselves with whom they will associate." *Id.* at 214 (emphasis added). The RNC also cited *Eu*

v. *San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), in which the Court stated that "[i]t is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments." *Id.* at 224. But the freedom of association that the Court upheld in *Eu* was also that of the rank and file. The Court referred to the associational rights of "political parties *and their members*" numerous times throughout the opinion. *Id.* at 216, 219, 221, 222, 225 n.15, 229, 231, 232, 233. At no point did the Court suggest that the associational rights of political parties exist separately from the rights of their members such that they could trump the rights of the members. Indeed, as Respondents point out in their brief on the merits, Resp't Br. at 21, the *Eu* Court *rejected* California's contention that a party's "leadership" could "consent" to "infringements of *members' rights*," which are "independent" of those belonging to the parties themselves. 489 U.S. at 225 n.15 (emphasis added).

Petitioners also cite *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000), for the proposition that political parties have freestanding associational rights independent of their members. County Br. at 38. This is a gross mischaracterization of *Jones*, which held California's "blanket primary" unconstitutional because it infringed on the rights of party *members* to choose with whom they wished to associate. 530 U.S. at 567. Relying on *Jones*, Petitioners assert that the Second Circuit's ruling "raises the real prospect of 'sadd[ling a party] with an unwanted, and possibly antithetical, nominee.'" County Br. at 39 (quoting *Jones*, 530 U.S. at 579) (alteration in original). But the danger in *Jones* was that a candidate who lacked the support of the party's *members* would be nominated. Petitioners turn *Jones*'s reasoning on its head by using it to argue that a nominee whom a party's members *support* would be "unwanted" by the party. *Jones* was a case about the rights of the rank and file to choose a candidate; indeed, the *Jones* Court explicitly noted that "the

ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership." *Jones*, 530 U.S. at 581. The problem with California's law was that it was designed to result in the party's nomination going to candidates who held ideological positions the parties did not accept. *Id.* at 587 (Kennedy, J., concurring). New York's law has the same problem: It *ensures* that nominees for Supreme Court Justice need not cater their positions to party members' preferences.

The only support that Petitioners can adduce for the proposition that political parties have freestanding rights entirely separable from those of their members are a handful of older cases from the courts of appeals. See Pet. Cert. 25-29 (citing *LaRouche* v. *Fowler*, 152 F.3d 974, 995 (D.C. Cir. 1998); *Bachur* v. *Democratic Nat'l Party*, 836 F.2d 837 (4th Cir. 1987); *Ripon Soc'y, Inc.* v. *Nat'l Republican Party*, 525 F.2d 567 (D.C. Cir. 1975) (en banc)). These cases are of limited value as authority for this proposition because they all represented challenges by individual voters to party rules, rather than challenges to a state law that, as here, *mandates* a certain procedure. Where a party and, presumably, many of its members have chosen to adopt a set of rules, the party's claim of associational freedom is much stronger than when a state law *requires* the party to adopt certain rules—particularly rules that *restrict* the rights of the vast majority of the party's members.

B. The Convention System Cuts Party Members Out Of The Nominating Process Altogether.

Instead of preserving the rights of party members, the convention system effectively shuts rank-and-file members out of the process of picking their party's nominee entirely. New York's election law, by statutory design, gives local party leaders a stranglehold over the judicial nomination process. Rank and file members like Mr. Dunne cannot influence it even if they try.

1. Party Members Have No Input Whatsoever Into Their Party's Nomination Process.

Petitioners claim that the convention system effectuates political parties' associational freedom, but the system actually operates to make sure that party members *cannot* choose with whom they associate. By design, the judicial nomination system shuts party members out of the nomination process entirely. The system provides no checks or balances by which the rank-and-file members can override the decisions of party bosses. As discussed above in detail, the system creates huge structural barriers to reform at every level: Challenger candidates cannot appeal to party voters directly in order to seek the nomination; potential reformers face huge obstacles in seeking even to become *delegates*; independent delegates cannot possibly influence the outcome of a convention; and rank-and-file members have no opportunity to influence the process at any stage.

The robust record developed in the district court amply demonstrates that the nomination system New York has imposed on voters serves to frustrate, rather than effectuate, the choices of the rank and file. Margarita López Torres tried repeatedly and aggressively to obtain her party's nomination for a seat on the Supreme Court bench. The legislative scheme at issue in this case enabled a tiny handful of party bosses to deny her the nomination without any input from party voters. Yet, when Judge López Torres stood for election to judgeship *not* controlled by party "leaders," the *members* of her party voted overwhelmingly for her, in record numbers. When a candidate with unprecedented popularity among actual voters is prevented by state law from even *asking* those voters to nominate her to an elective office for which she is undoubtedly qualified, it is the voters whose rights have been abridged. And as the Second Circuit noted, Judge López Torres's experience was not an "anamolous political mugging." PA-29a. The Feerick Commission, on which Mr. Dunne served, found that such problems exist not

just in Brooklyn, but throughout the state. The facts of this case are not aberrant; they are paradigmatic.

Indeed, Mr. Dunne's own experience is illustrative. Despite his record of dedication to the Republican Party and his demonstrated expertise in the area of judicial elections, he has never been put forward as a delegate candidate, even though he asked repeatedly for the opportunity. Instead, he has been passed over by local bosses in favor of slates of delegates who can be relied upon to rubber stamp the choices of the "leadership." These slating decisions are unreviewable. If a State Senator with 24 years' service to his party can be shut out of the nomination process entirely, there is little hope for rank-and-file party members who do not hold elected office.

Such a system is entirely contrary to the values behind the Supreme Court's cases upholding the associational freedom of political parties. *La Follette* refused to order the Democratic Party to seat Wisconsin delegates elected under state law that was contrary to party rules, because to do so would be a "substantial intrusion into the associational freedom *of members of the National Party.*" *La Follette*, 450 U.S. at 126 (emphasis added). The Court in *Jones* struck down California's blanket primary because it forced party members to associate with individuals they did not support. See *Jones*, 530 U.S. at 575-76. The *Jones* Court suggested that the choice of a party's *members* deserved more attention in a First Amendment analysis than the choice of the party's leaders. *Id.* at 581 (dismissing argument that blanket primary did not limit party's associational freedom because party leaders could still endorse candidates on ground that "the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership."). In this case, where the facts make clear that the challenged state law actually prevents a candidate *favored* by huge swaths of party members from

even *seeking* nomination, First Amendment values are severely threatened.

2. The System Is Controlled By Entrenched Party Bosses.

The judicial election law and the convention system it creates guarantee that entrenched local party leaders have complete control over judicial nominations, and thus, over who becomes a Supreme Court Justice. And despite powerful opposition from all corners, the convention system has shown itself to be remarkably immobile. This is so because the very legislative structure that empowers local bosses creates disincentives for elected legislators to effect any sort of meaningful change, even if those legislators believe that change is in the best interests of voters.

The convention system is roundly criticized by elected and appointed leaders across New York's political spectrum. Even many of the most powerful members of the Republican and Democratic parties oppose the convention system. The words and actions of popularly elected representatives stand in opposition to the stated positions of the "leadership" of each political party in this Court.

For example, the Republican chairman of New York's Senate Judiciary Committee, John DeFrancisco, has strongly criticized the current system.[4] And, with the district court injunction in this case serving as a catalyst, the *entire* Republican caucus of the State Senate eventually supported Senator DeFrancisco's bill abolishing conventions. S. 55-A, 2005-

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[4] See Press Release, Senator Joseph L. Bruno, Senate Passes Legislation to Amend Supreme Court Candidate Selection Process (Feb. 13, 2006) ("[T]he current system * * * unfairly removes party voters from having a say in the process and it can potentially put Supreme Court nominations out of reach for several qualified candidates."), *available at* http://www.senatorbruno.com/press_archive_story.asp?id=12828 (last visited July 12, 2007).

2006 Reg. Sess., at 1 (N.Y. 2006). Mayor Michael Bloomberg, while still a member of the Republican Party, also voiced powerful opposition.[5] Democratic leaders opposed to the system include Governor Eliot Spitzer,[6] former New York City Mayor Edward Koch,[7] And Brooklyn District

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[5] Press Release, Mayor Michael R. Bloomberg, Mayor Michael R. Bloomberg Delivers Testimony Before the Commission to Promote Public Confidence in Judicial Elections (Sept. 16, 2003) ("[P]arty judicial conventions * * * are completely shrouded in secrecy with absolutely no input from the electorate."), *available at* http://www.ci.nyc.ny.us/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http://www.ci.nyc.ny.us/html/om/html/2003b/pr257-03.html&cc=unused1978&rc=1194&ndi=1 (last visited July 12, 2007).

[6] Tom Precious, *Spitzer Calls for Reform of Redistricting*, BUFFALO NEWS, November 22, 2005, at A7 ("Spitzer also said the state's system for electing judges -- which features judges getting on ballots after going through 'a system dominated by cronyism and backroom deals' -- should, at the very least, be replaced by a merit-type system involving independent screening panels that select candidates instead of local party leaders."); Linda Greenhouse, *Judge Selection To Be Reviewed By U.S. Justices*, N.Y. TIMES, February 20, 2007, at B1 ("Mr. Spitzer indicated that he did not support the existing system, which he said was "in dire need of reform." * * * [T]he governor-elect said that "there must be a way to primary onto the ballot," and added that "I will not support anything that has a closed convention structure, where only those who came out of the convention could be on the ballot.").

[7] Br. of Edward I. Koch as *Amicus Curiae* for Affirmance in Support of Appellees at 9-10, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2d Cir. 2006) (No. 06-0635-CV) ("When local party and county leaders hand-pick judges, not only do the voters suffer, but so too does our compelling interest in maintaining the rule of law, as well as the constitutional and democratic values which it protects.").

Attorney Charles Hynes.[8] Important state judicial officers have also called for change, including Judith Kaye, Chief Judge of the New York Court of Appeals,[9] Jonathan Lippman, presiding Justice of the state appeals court in Manhattan and former Chief Administrative Judge of the New York court system,[10] and Judges Richard Bartlett, Joseph Bellacosa, and E. Leo Milonas, also former Chief Administrative Judges.[11]

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[8] Br. of *Amicus Curiae*, Charles J. Hynes, District Attorney, Kings County, New York, in Support of Plaintiffs-Appellees, Seeking Affirmance of the Order of the District Court at 2, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("So long as the district convention system remains in place, the party leaders and not the voters of this State determine who fills each seat on the bench of the Supreme Court, and the rights of legitimately qualified candidates to the bench will be frustrated.").

[9] JUDITH S. KAYE, N.Y. STATE UNIFIED COURT SYSTEM, THE STATE OF THE JUDICIARY 4 (February 6, 2006) ("[G]iven the extensive findings of the Feerick Commission and the extensive findings of the United States District Court, we are not dealing solely with a 'Brooklyn problem,' or a 'New York City problem' * * * The issues that have been identified are pervasive, both systematically and geographically.").

[10] Judge Jonathan Lippman, The Public Policy Forum: Court Reform in New York State (May 17, 2005) ("Our responsibility to the public is to take immediate steps to ensure public trust and confidence and address the problems that we know exist—that * * * a very few political leaders * * * determine who becomes a judge in one party districts * * *."), *available at* http://www.rockinst.org/assets/F6FC4E1B-4290-42D7-BBA3-E5761D783F81.pdf (last visited July 12, 2007).

[11] Br. of Former N.Y. State Judges as *Amici Curiae* in Support of Plaintiffs-Appellants and Supporting Affirmance at 10, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("New York has fostered and tolerated a system in which voters not only are deprived of their right to choose, but

Political and judicial leaders are not the only ones calling for change. Influential newspapers throughout the state have opposed the judicial election scheme as well. These papers include the New York Times,[12] the Buffalo News,[13] the Syracuse Post-Standard,[14] the Rochester Democrat and Chronicle,[15] the Albany Times Union,[16] the New York Daily

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in which they are left to question whether they have been denied that right in order for others to use objectionable criteria to determine who will become judges.").

[12] See Editorial, *Breaking Down the Clubhouse*, N.Y. TIMES, Sept. 9, 2006, at A14 ("The current system of choosing judges through secret deals and old-fashioned cronyism corrodes the integrity of the legal system and diminishes the courts.").

[13] See Editorial, *Yes, Choose Judges Democratically*, BUFFALO NEWS, Feb. 1, 2006, at A8 ("Push came to shove for the inherently undemocratic way New Yorkers select candidates for State Supreme Court judgeships. A federal judge in Brooklyn ruled last week what reformers and critics knew all along—political party bosses should not pick judges.").

[14] See Editorial, *Justice for Voters*, SYRACUSE POST STANDARD, Nov. 22, 2006, at A10 ("Under the discredited system, party bosses gathered behind closed doors to decide who the judicial candidates would be. [It was] virtually impossible for a candidate not blessed by the party to win the nomination.").

[15] See Editorial, *Court System Broken*, ROCHESTER DEMOCRAT AND CHRONICLE, Jan. 28, 2007 ("The Supreme Court judicial selection process in New York—closed conventions with hand-picked delegates often beholden to party bosses—belongs in the museum of political chicanery, not still churning out favored candidates in the 21st century.").

[16] See Editorial, *Last Word on Judges*, ALBANY TIMES UNION, Feb. 24, 2007, at A8 ("[Party] bosses * * * have the largest say in who is nominated because they have the most influence in choosing the convention delegates who place the names in nomination. The bosses also have the power to strike cross-endorsement deals with the opposing party, thereby denying voters a choice and ensuring the election of a favored candidate.").

News,[17] and New York Newsday.[18] Highly respected political and legal organizations oppose the current system as well, including the Association of the Bar of the City of New York[19]; the Asian American Legal Defense Fund, Puerto Rican Legal Defense Fund, the Amistad Black Bar Association, the Center for Law and Social Justice, Latino Lawyers of Queens, the Puerto Rican Bar Association, and the Rochester

[17] See Editorial, *Death Sentence For Boss Rule*, N.Y. DAILY NEWS, Sept. 5, 2006, at 34 ("The [Second Circuit's] ruling * * * was stunning in the extent to which [the] panel laid bare, fact by fact, how the bosses exploit rigged procedures to deny the voters any say in selecting jurists for the state's primary trial courts.").

[18] See Editorial, *Don't Let Pols Choose Judges*, N.Y. NEWSDAY, Feb. 22, 2007, at A36 ("The current system makes for sham elections.").

[19] See Br. of *Amicus Curiae* the Ass'n of the Bar of the City of N.Y. in Support of Affirmance at 7-8, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("The judicial district nominating conventions * * * accomplish no proper purpose. Under the present system, delegates to the judicial convention generally do as they are told by the political leaders who select them, and therefore play no constructive role in the judicial selection process.")

Black Bar Association[20]; the Fund for Modern Courts[21]; and the Citizens Union.[22]

Yet despite this overwhelming opposition, the convention system remains unchanged. The current system is deeply entrenched precisely because of the great power it gives to local party leaders. Senator Martin Connor's testimony in the district court shows why the current system is so difficult to change. Even though Senator Connor felt that a judicial candidate being nominated at a convention was grossly unqualified, he was afraid and unable to speak up because of the political costs of opposing the local party official who supported the nominee. Local party officials will not give up their power over judicial selection without a fight, and politicians are loath to pick fights they are unlikely to win. Elected officials feel unable to challenge the local party officials on whom they must rely for support, and it is for this reason that the state legislature has shown little inclination to change the election law over the decades, despite almost universal sentiment that the system is flawed.

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[20] Br. of *Amici Curiae* for Affirmance the Asian American Legal Defense and Educ. Fund et al. at 1, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("Minorities seeking to become supreme court justices in this state are not served by a closed, back-door system built on cronyism and political favors.").

[21] Br. of *Amicus Curiae* Fund for Modern Courts in Support of Affirmance at 2, López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2nd Cir. 2006) (No. 06-0635-CV) ("The selection of Supreme Court justices in New York is, by and large, a process controlled not by the voters but by political leaders, largely unaccountable to the citizens of New York.").

[22] Br. for *Amicus Curiae* Citizens Union of the City of N.Y. at 3-4 ("[T]he unique structure of New York's convention system, as it has operated for decades, results in political party leaders hand picking New York's Supreme Court justices, while New York's voters are denied any significant role in the process.").

That is, until the district court's ruling and Second Circuit's affirmance. Until this Court granted certiorari, state legislators were finally moving forward toward meaningful reform. One court order had the potential to fix a broken political process and finally end the party bosses' long death-grip on the state judiciary. The Supreme Court can make, and has made, contributions to democracy by refusing to uphold laws that impose structural impediments frustrating voters' ability to make changes through purely political means. *Reynolds* v. *Sims*, 377 U.S. 533 (1964), perhaps this Court's most famous foray into state election practices, has received praise for overturning entrenched state systems that had proven insusceptible to normal political attack despite opposition by the majority of voters in many states. See, *e.g.*, Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 45-46 (2004); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 541 (1997). More recently, the Court in *Randall* v. *Sorrell*, 126 S. Ct. 2479 (2006), was motivated in part by concerns over incumbent entrenchment when it struck down Vermont's limits on campaign donations. An affirmance in this case would be consistent with this Court's important tradition of ensuring that electoral systems truly effectuate the choices of the *voters*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,
Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE CHARLES J. HYNES, DISTRICT ATTORNEY FOR KINGS COUNTY, NEW YORK, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE FIRST AMENDMENT REQUIRES NEW YORK TO GIVE RANK-AND-FILE POLITICAL PARTY MEMBERS A MEANINGFUL OPPORTUNITY TO PARTICIPATE IN CHOOSING STATE SUPREME COURT NOMINEES 6

A. The First Amendment Protects Party Members' Right To Associate To Determine Their Party's Nominees And Direction 6

B. The Constitutionality Of New York's Unique Statutory Judicial-Nominating Scheme Requires A Realistic Assessment Of That System's Effect On Party Members, Candidates, And The Judiciary 7

II. NEW YORK'S SYSTEM FOR ELECTING STATE SUPREME COURT JUDGES INVITES CORRUPTION AND IMPROPRIETY: THE EVIDENCE RELATING TO BROOKLYN 10

A. The History Of López Torres's Attempts To Obtain A Supreme Court Seat 10

B. Other Evidence Of Corruption In The System For Selecting Supreme Court Nominees 16

C. The Link Between Corruption In The System For Electing Justices And Corruption In The Administration Of Justice 20

TABLE OF CONTENTS—Continued

Page

III. CORRUPTION AND ABUSE DUE TO EXCLUSION OF THE RANK-AND-FILE FROM ANY MEANINGFUL ROLE IN CHOOSING SUPREME COURT NOMINEES ARE STATEWIDE PROBLEMS 23

A. Party Leaders' Control Over Supreme Court Nominations Is A Statewide Problem 24

B. Party Leaders Exploit Supreme Court Nominations In A Variety Of Ways 27

C. Party Leaders' Control Over Supreme Court Nominations Has Defied Repeated Calls For Reform 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page(s)

Anderson v. *Celebrezze*, 460 U.S. 780 (1983) 3, 7, 8
Bullock v. *Carter*, 405 U.S. 134 (1972) 4, 8
California Democratic Party v. *Jones*, 530 U.S. 567 (2000) 3, 8
Cousins v. *Wigoda*, 419 U.S. 477 (1975) 6
Eu v. *San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) 7
Kusper v. *Pontikes*, 414 U.S. 51 (1973) 7
In re Gershenoff, 793 N.Y.S.2d 397 (N.Y. App. Div. 2005) 22
In re Barry Salman, 1994 WL 897717 (N.Y. Comm'n Jud. Conduct Jan. 26, 1994) 24
In re Mark Farrell, 2004 WL 1813745 (N.Y. Comm'n Jud. Conduct June 24, 2004) 25
In re Mason, 2002 WL 1477774 (N.Y. Comm'n Jud. Conduct June 21, 2002) 22
In re Mason, 790 N.E.2d 769 (N.Y. 2003) 22
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Tashjian v. *Republican Party of Connecticut*, 479 U.S. 208 (1986) 7, 8

STATUTES AND RULES

N.Y. City Civ. Ct. Act § 102-a(3) 28
N.Y. Elec. Law § 6-124 2
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N.Y. Elec. Law § 17-162 18
S. Ct. Rule 32.3 14

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Page(s)

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Page(s)

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Wise, Daniel, *Garson Loses Bid to Delay Prison Term During Appeal*, 237 N.Y.L.J. 1 (June 21, 2007) 21

Wise, Daniel, *NY Judge Who Reportedly Offered to Wear Wire to Set Up Colleague Sees Plea Deal Evaporate*, 237 N.Y.L.J. 1 (June 14, 2007) 21

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Since 1990, I have served as the elected District Attorney of Kings County (Brooklyn), New York. In that capacity, I have overseen and presently oversee criminal investigations and prosecutions into allegations that the leaders of the Kings County Democratic Party have corruptly used their power to select, influence, and control the state judiciary in Brooklyn. These include the recent (February 2007) successful prosecution of Clarence Norman, who at the time of his crimes was the chairman and the de facto "boss" of the Kings County Democratic County Committee.

As a result of my work as District Attorney and of my long career as an attorney in New York State, I believe I have a distinct insight into the issues presented by this case. In particular, I believe, indeed I know, that New York's uniquely constructed and statutorily-mandated nominating process for the state Supreme Court, which in effect places ultimate control over who becomes a state Supreme Court justice in the hands of powerful county political party leaders, creates and sustains a breeding ground for corruption and malfeasance and undermines the public's confidence in the judiciary. Under the current system, party leaders select Supreme Court nominees based on their political connections and/or contributions to the party or its leaders; voters lack any meaningful opportunity to nominate, let alone elect, an alternative candidate to those nominees; and, once elected, the judges (desiring to be re-nominated and re-elected or, in the case of lower-court judges, desiring to be promoted to the Supreme Court) come under great pressure to carry out their duties in a manner that satisfies party

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for any of the parties, and no person or entity other than the Amicus, the staff of the Kings County District Attorney's Office, or counsel to the Amicus made a monetary contribution to the preparation or submission of this brief. Counsel for Amicus wishes to thank Craig Heeren and Tian Tian Mayimin for their stellar assistance in the preparation of this brief.

leaders. The result is a system in which only party-chosen candidates attain the Supreme Court bench and in which public confidence in the administration of justice and the rule of law is low.

I submit this amicus brief to give the Court a practical, ground-level illustration of these problems, in part by recounting official corruption cases that the Kings Country District Attorney's Office has prosecuted. I similarly participated as amicus curiae in the Court of Appeals. I respectfully urge this Court to affirm the decision below.

SUMMARY OF ARGUMENT

As the record below and the record of prosecutions brought by the Kings Country District Attorney's Office show, for more than a decade, Clarence Norman, who was the leader of the Democratic Party in Kings County, maintained essentially complete control over the nominations for the office of Justice of the New York Supreme Court in Brooklyn.[2] This was not an isolated instance of a party leader's control of the judicial selection process. Instead, it reflected a widely-known fact of life in New York State: to become a justice of the state Supreme Court, one must be selected by party leaders.

In theory, rank-and-file party members are to have a meaningful say in the nominations process for the Supreme Court. Under New York's Election Law, party members vote, at the primary election, for the delegates to judicial district conventions, at which the nominees for the Supreme Court are then chosen. *See* N.Y. Elec. Law § 6-124 ("[a] judicial district convention shall be *constituted by the election at the preceding primary of delegates* and alternate delegates") (emphasis added). In reality, however, the power to select nominees for the Supreme Court has always resided with

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[2] The Second Judicial District encompasses the New York City boroughs of Brooklyn (Kings County) and Staten Island (Richmond County). Because the Second Judicial District, like most of the eleven other judicial districts in New York, has long been dominated by a single party, nomination by the dominant party is tantamount to election.

party leaders, like Mr. Norman. That is because, as the District Court and Court of Appeals below have chronicled, New York's statutory scheme was designed to, and does, place severe and all-but-insurmountable barriers in the path of any aspirant for a Supreme Court judgeship who has not been chosen by party leaders.

The District Court and the Court of Appeals were correct to hold that this "Potemkin Village" arrangement, which creates the illusion but lacks the reality of popular sovereignty, violates voters' and candidates' First Amendment rights. Having decided to regulate how political parties select their state Supreme Court nominees, New York was required to erect a selection mechanism that abides by the "limits imposed by the Constitution." *California Democratic Party* v. *Jones*, 530 U.S. 567, 573 (2000). Specifically, because New York has chosen "to tap the energy and the legitimizing power of the democratic process" by mandating a process by which elected delegates choose nominees who then stand in a general election, it must "accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 788 (2002) (internal quotation marks and alteration omitted). As the courts below recognized, the process that New York has statutorily mandated violates two closely related and basic rights protected by the First Amendment: "the right of individuals to associate for the advancement of political beliefs" and "the right of qualified voters . . . to cast their votes effectively." Pet. App. 34 (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983)).

Petitioners seek to caricature the dispute in this case by asserting that the Court of Appeals' logic would broadly invalidate any method in which nominees to any elective office in any State are chosen by delegates to a party convention. However, as its decision makes clear, the Court of Appeals narrowly ruled on the basis of the unique operation and the dismaying history of the judicial district convention system used to select Supreme Court nominees in New York State. The Court of Appeals inquired whether that system burdens the rights of candidates and voters and held that it did. That

was the correct analysis, because, as this Court has emphasized, the First Amendment inquiry is at bottom practical, contextual, and granular, not abstract: "[I]t is essential to examine in a realistic light the extent and nature of [that scheme's] impact on voters." *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972).

As to this inquiry, the record below and the historical record, including prosecutions brought by the Kings Country District Attorney's Office, reveal two things. First, New York's extraordinarily burdensome and opaque petitioning requirements to become a convention delegate effectively prevent all but those candidates who have been anointed by party leaders from offering themselves as candidates at the party's nominating conventions. Second, even if an independent candidate were improbably to muster the resources to contend for a party's nomination, the judicial conventions are stacked formalities that reliably rubberstamp the party leaders' hand-picked candidates. In effect, a rank-and-file party member's rights of political association and to vote for judicial delegates in the primary are meaningful only if the party member's preferred candidate happens to coincide with the candidate pre-selected by the party leaders.

This amicus brief reviews the evidence of "boss control" over the nomination process, first in Brooklyn, and then more broadly in New York State, and focuses particularly on the tendency of this system to breed corruption. By ceding to party leaders nearly complete control over who sits on New York's trial-level bench, New York's statutory scheme invites corruption and diminishes the public's confidence in the state judiciary. In Brooklyn, the experience of plaintiff Margarita López Torres, whose experience as a Civil Court judge was chronicled below and in the Kings Country District Attorney's Office's recent successful prosecution of Clarence Norman for grand larceny by extortion, is revealing. In a 2002 direct primary for the Civil Court, Judge López Torres beat the Democratic Party machine's hand-picked candidate and ultimately garnered over 200,000 votes in the general election. Yet because he controlled the nomination process, Clarence Norman was able to single-

handedly deny her the nomination to the state Supreme Court. He did so in express retaliation for her earlier refusal to hire the court attorney foisted on her by the party leaders. Similarly, in the recent trial of Mr. Norman, the prosecution demonstrated that another judicial candidate for the Civil Court, cowed by Mr. Norman's ability to "dump her [candidacy]" and to withhold a future Supreme Court nomination, succumbed to his demands that she divert her campaign funds to the coffers of his associates. *See infra*, pp. 15-16.

As this brief further demonstrates, and as the courts below found, New York's Election Law has given party leaders similar control over Supreme Court judicial nominations in other counties throughout the state, a reality that is common knowledge among judges, judicial aspirants, politicians, and lawyers. As a result, nominations to these important judgeships have been turned into currency with which party leaders bargain. Numerous judicial disciplinary decisions, public inquiries, and news reports make clear that improprieties linked to the Supreme Court nomination process are all too common. The problem of corruption thus is closely interwoven with the constitutional infirmity identified by the courts below.

No matter how aggressive and effective law enforcement officials may be in investigating and prosecuting corrupt participants in this system, such after-the-fact efforts are no solution to what is fundamentally a systemic shortcoming that denies voters and candidates their First Amendment rights. These efforts cannot redress the de facto exclusion of rank-and-file party members from the Supreme Court nomination process; they cannot give voters a meaningful say in who the state's judges are; they cannot replace political cronies with able jurists; and they cannot stem the loss of public confidence in the courts. Rather, these problems—the inevitable results of New York's unconstitutional statutory scheme—can be remedied only by the invalidation of that scheme and its replacement by a system that is constitutional. I therefore respectfully urge that the decision below be affirmed.

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES NEW YORK TO GIVE RANK-AND-FILE POLITICAL PARTY MEMBERS A MEANINGFUL OPPORTUNITY TO PARTICIPATE IN CHOOSING STATE SUPREME COURT NOMINEES

Whether the process that political parties in New York are required to use for choosing their Supreme Court nominees is constitutional turns on two related questions. First, does the First Amendment protect members of political parties who seek by voting in a statutorily mandated selection process to meaningfully participate in their parties' nomination decisions? Second, if so, does New York's statutory scheme, which effectively precludes party members from associating with candidates not pre-selected by the party leadership, unjustifiably burden the rights protected by the First Amendment?

As the courts below recognized, the answer to both questions is yes. Although the Constitution does not compel New York ab initio to afford party members an opportunity to vote to select the party's judicial nominees, New York has enacted a comprehensive statutory scheme for the election by such party members of judicial nominating delegates. This in turn requires New York to ensure that this scheme respects the First Amendment right to associate of party members and candidates. New York's statutory scheme abridges those rights. The hurdles it imposes make it all but impossible for a candidate who has not been pre-selected by party leaders to win such a nomination. This burdens the rights both of candidates and of voters, who are denied a meaningful opportunity to participate in the nominating process.

A. The First Amendment Protects Party Members' Right To Associate To Determine Their Party's Nominees And Direction

The First Amendment protects an individual's right to associate with others to press common political views, including the "basic constitutional freedom" to join together under the aegis of political parties "for the common advancement of political beliefs and ideas." *Cousins* v. *Wigoda*,

419 U.S. 477, 487 (1975) (internal quotation marks omitted). Joining a political party, however, does not extinguish the associational rights of the individual party members or subsume them under the banner of the party's right of association. For a state to demand that a party member acquiesce to every decision of the party's leaders as to the party's objectives could not be squared with the First Amendment. Rather, party members retain an "independent right" of association to determine their party's goals and practices. *See Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 225-226 (1989) (in the party primary context, "the State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members [and fails to show] that the members authorized the parties to consent to infringements of members' rights").

The independent associational right of party members is particularly salient when they seek to have their voices heard in a state-sponsored primary, a context in which the preferences of party leaders often "diverge[] significantly from the views of the . . . rank and file." *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 236 (1986) (Scalia, J., dissenting); *see also Kusper* v. *Pontikes*, 414 U.S. 51, 58 (1973) (a "prime objective" to join a party for many in the rank-and-file is to "gain a voice in [the nominee] selection process"). As this Court recognized in *Anderson* v. *Celebrezze*, "voters can assert their preferences only through candidates or parties or both." 460 U.S. 780, 787 (1983). In the context of an intra-party primary election, rank-and-file party members' associational right would be rendered worthless were they denied any meaningful opportunity to associate with candidates not favored by the party leaders, and were the leader-selected candidate instead assured of the party's nomination. Such a denial would be manifestly inconsistent with the state's duty, in erecting a statutory electoral process that "tap[s] the energy and the legitimizing power of the democratic process," to "accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn.* v. *White*, 536 U.S. 765, 788 (2002) (internal quotation marks and alteration omitted);

see also California Democratic Party v. *Jones*, 530 U.S. 567, 573 (2000).

B. The Constitutionality Of New York's Unique Statutory Judicial-Nominating Scheme Requires A Realistic Assessment Of That System's Effect On Party Members, Candidates, And The Judiciary

In order to determine whether the system that New York has mandated for nominating candidates for Supreme Court judgeships accords candidates and party members their First Amendment rights, this Court must conduct a concrete, tangible inquiry into the operation and effects of that particular system. Petitioners posit that this case presents the generalized issue of whether all electoral systems in which convention delegates rather than party members make the ultimate nomination decision are constitutionally infirm. *See, e.g.*, Pet. Br. of N.Y. County Democratic Comm., *et. al.* 15-16, 20; Pet. Br. of N.Y. Att'y Gen. 29; Pet. Br. of N.Y. State Bd. of Elections, *et. al.* 29. But that is a straw man. The proper inquiry is instead at the level of the specific nominee-selection system under review. The Court must consider "the character and magnitude of the asserted injury to the [First Amendment] rights" by this system, "identify and evaluate the precise interests [asserted] by [New York State] as justifications," and "weigh[] all these factors" together. *Anderson*, 460 U.S. at 789; *see also Tashjian*, 479 U.S. at 234 (Scalia, J., dissenting) (examination "requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case"). At base, then, "it is essential to examine in a realistic light the extent and nature of [New York's electoral scheme's] impact on voters." *Anderson*, 460 U.S. at 786 (quoting *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972)).

The courts below conducted the requisite realistic assessment of the burdens on the associational right of party members imposed by New York's statutory scheme. As the District Court and Court of Appeals each concluded, the ballot access requirements for the judicial delegate election are baroquely designed (for no purpose other than to allow party leaders to exercise complete control over the judicial district

convention) and uniquely stringent. The signature collection process alone requires candidates to collect, realistically, between 1,000 and 1,500 signatures *within each assembly district* within the candidate's judicial district to withstand the cost-prohibitive signature challenges financed by the party. Pet. App. 12-13, 108. Even if a candidate were to obtain the necessary signatures to run a slate of delegates, she faces a further hurdle, in that the primary ballot does not identify which candidate a putative delegate favors; she must find a way to educate the voters in each assembly district about which delegate candidates will support her. *Id.* at 13, 107. After the judicial delegates are elected, or "deemed elected" when, as is more often than not the case, there are no challenger delegates, only two weeks, at most, remain for a judicial candidate to learn the identities of the delegates and to lobby for their support, making meaningful meetings all but impossible. *Id.* at 18, 116-117. Given these seemingly Kafkaesque hurdles, it is no surprise that the judicial nominating conventions are, in the words of a long-time delegate to the Ninth District Republican Party judicial convention, "merely a formality" to rubber-stamp the party leaders' choices. *See* JA 242.

The balance of this brief focuses on the statutory system's practical operation and impact on voters, judicial aspirants, and the judiciary. It focuses first on Brooklyn, where it spotlights several notorious case studies of "boss control," the evidence relating to which was developed both below and in criminal prosecutions brought by the Kings County District Attorney's Office. It then canvasses materials relating to "boss control" statewide. This evidence confirms the dynamic found by the District Court, in which local party leaders exert nearly total control over the state Supreme Court nomination process, shut out rank-and-file party members from any meaningful participation in choosing their nominees for judicial office, and choose candidates on the basis of loyalty or quid pro quo, rather than purely on merit. And it illustrates a system in which the proper administration of justice takes at best a back seat and the public justifiably loses confidence in the judicial system.

II. New York's System For Electing State Supreme Court Judges Invites Corruption and Impropriety: The Evidence Relating To Brooklyn

The domination by political party leaders of the judicial-selection system in Brooklyn is revealed by the history of lead plaintiff Margarita López Torres, a former Brooklyn Civil Court Judge (and current Brooklyn Surrogate's Court Judge) who was long stymied in her efforts to gain a Supreme Court nomination. Judge López Torres's history was developed below, and was further fleshed out in testimony during the Brooklyn District Attorney's Office's recent prosecution of former party leader Clarence Norman for grand larceny by extortion and coercion. More broadly, the evidence in the Norman criminal trial, and also in a second prosecution by the Kings Country District Attorney's Office (of Gerald Garson, a long-time power in the Democratic Party in Brooklyn and a former Justice of the Kings County Supreme Court), underscores how party leaders' control over nominations to the King County Supreme Court have fostered corruption in the nomination process and corruption on the bench. Consistent with this evidence from court proceedings, many public reports and news stories have recounted the ways through which influence, favors, and money have played an inappropriate role. Drawing on those sources, this section provides an account of "the way it works"—to quote Mr. Norman—in Kings County under the judicial district nominating system. JA 173.

A. The History Of López Torres's Attempts To Obtain A Supreme Court Seat

When Judge López Torres won a seat on the Civil Court in Brooklyn with the support of the Kings County Democratic Party in 1992, she did not expect that the party's endorsement indebted her to the party during her tenure on the bench. As the District Court's findings demonstrate, she was wrong. As Judge López Torres testified, shortly after she was elected, she was instructed by a party functionary

to make a patronage hire.[3] JA 172. In a letter "congratulating" her on her election, a party official explained that Clarence Norman and Vito Lopez, the state assemblyman (and current leader of the Democratic Party in Brooklyn) through whose primary sponsorship Judge López Torres had obtained her endorsement, wanted her to hire a particular lawyer as her court attorney. *Id.* Judge López Torres testified that she reviewed the resume attached to the letter, interviewed the candidate, and followed up on his references. She was unimpressed—the candidate's prior employer, a Brooklyn Supreme Court justice for whom he had served as law secretary, called his work mediocre and stated that he spent too much time on the phone doing political work—and so she hired a more qualified attorney. JA 172-173.

While the choice of her court attorney was a professional employment decision from the perspective of Judge López Torres, the leaders of the Brooklyn Democratic Party saw it as an act of ungrateful betrayal, disqualifying her from ever again receiving the party's support for any judgeship. As Judge López Torres testified, Mr. Norman was "extremely upset" by her refusal to comply with his demands, and he called Judge López Torres to explain that she did not "understand the way it works." JA 173. Mr. Norman instructed Judge López Torres that the "way it works" is that court attorney positions are handed out as rewards to those attorneys who work hard for the party. *Id.* Mr. Norman further told her that she had obtained her Civil Court judgeship "for nothing," and he demanded that she "unhire" the individual she had selected over the party's choice and instead hire a candidate of the party's bidding. *Id.* When Judge López Torres refused, Mr. Norman made the stakes clear: he told her that the party would not forget her actions when it came time for her to seek a seat on the Supreme Court, as

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[3] Under the District Court's procedure for receiving testimony, Judge López Torres submitted a sworn declaration and was then subject to cross-examination. In the interests of simplicity, both the declaration and the cross-examination are referred to herein as "testimony."

many Civil Court judges do. As Judge López Torres testified, Mr. Norman reminded her that without the "County's"—that is, his own—support, her nomination for the Supreme Court "will not happen." JA 173-174.

Mr. Norman was not alone in expecting patronage favors from Judge López Torres. As Judge López Torres testified, Assemblyman Lopez also chastised her for her refusal to hire the candidate recommended by Mr. Norman. He complained that she had "made him look bad" in the Brooklyn party organization, given his support of her candidacy. JA 174. He, too, demanded that she fire her court attorney and make a patronage hire instead. Once more, she refused. *Id.* Notwithstanding her refusal, party leaders continued to try to influence her hiring decisions. Judge López Torres testified that, after she had been on the bench for several years, Assemblyman Lopez reached out again and dangled the prospect of a Supreme Court position for her if she would hire his daughter, who was fresh out of law school, as her new court attorney. *Id.* She again refused. Tellingly, Assemblyman Lopez's daughter was hired by another Brooklyn Civil Court judge, who ultimately was nominated and elected to the Supreme Court. *Id.*

Consistent with his threats, Mr. Norman had the power to punish the judges who did not "play ball," and he used that power to block Judge López Torres from advancement. In 1997, Judge López Torres decided to seek a Democratic nomination for Supreme Court justice, and she sought out Mr. Norman for a meeting on that issue. JA 175. At that meeting, Judge López Torres testified, Mr. Norman told her that her failure to hire his candidate five years earlier had been a "serious breach of protocol." *Id.* She expressed her willingness to consider a qualified applicant from the party, and he told her that she now needed to get the support of the "Latino" district leaders. *Id.* She did not have much opportunity to seek this support, however, because several weeks later Mr. Norman placed "an urgent phone call" to her while she was on the bench, demanding that she remove her name from consideration at the convention. JA 175-176. She refused. Ultimately, her efforts failed: although several

party officials had originally asked her if she would be willing to seek the party nomination, not one dared to propose her name at the convention itself. *Id.* Judge López Torres's efforts in 1998 to obtain the party's nomination to the Supreme Court were similarly thwarted: after she was interviewed by the Kings County Judicial Screening Committee—which was under party control—both the chair of that committee and Mr. Norman himself refused to inform her whether the committee had found her qualified. JA 176.

In 2002, Mr. Norman endorsed another candidate to oppose Judge López Torres in the primary election for the Civil Court seat she held, leading her to mount an independent campaign for the Democratic nomination for that seat. She simultaneously again sought the party's nomination for the Supreme Court, writing both to Mr. Norman and to the chair of the judicial screening committee to declare her interest in a Supreme Court seat. JA 180, 189-190. The chair of that committee responded that the committee reviewed only those applications that had been referred by Mr. Norman. JA 180, 191. Judge López Torres then met with Mr. Norman to request his support. He told her that, while she was qualified, he would not support her because she had been "disloyal." JA 180. At the judicial nominating convention, the need for Mr. Norman's backing was apparent. A supportive delegate did submit Judge López Torres's name for consideration, and she received a number of votes. However, with the delegates having been handpicked by party leaders, the slate backed by Mr. Norman unsurprisingly won by a landslide. JA 180-181.

Meanwhile, the Brooklyn party leaders mobilized the party organization to actively work against her candidacy for reelection to the Civil Court. Indeed, as Judge López Torres and others testified at the Norman criminal trial, on the eve of the meeting at which the party's district leaders would select which candidates to endorse for Civil Court, Mr. Norman's own choices were invited to wait inside the diner in which district leaders were conferring so that the candidates could thank the district leaders after the endorsements were made official. Norman Tr. 780-786, 1023-

1028, 1152-1156, 1290-1292.[4] Judge López Torres, having been cut out of the process by Mr. Norman, nonetheless learned of the date, time, and place of the meeting, and stood outside the diner in a fruitless attempt to garner support. *Id.* at 780-783, 785-786, 1025, 1153-1154, 1290-1291. The difference between the candidates' experiences—for Mr. Norman's hand-picked candidates, showing up to a meeting whose favorable outcome was clear; for the candidate who had refused to grant Mr. Norman the patronage position he demanded, handing out leaflets in vain—demonstrated Mr. Norman's power. Yet notwithstanding Mr. Norman's retaliatory efforts, Judge López Torres (aided by an army of supporters frustrated by party control over the Civil Court bench) won the primary. This was possible because, for Civil Court seats, unlike for Supreme Court seats, rank-and-file party members had the opportunity to vote directly for candidates in a primary.[5] JA 181.

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[4] "Norman Tr." refers to the transcript from the most recent criminal trial of Mr. Norman, prosecuted by the Kings County District Attorney's Office in January and February 2007. *See People* v. *Norman*, Indictment No. 7189/03. A letter request to lodge this transcript with the Court has been filed with the Clerk pursuant to Rule 32.3.

[5] While the primary system for the Civil Court, in contrast to the primary system for the Supreme Court, permits party members to have a voice in the selection of the party's nominee, party leaders like Mr. Norman have nonetheless been able to leverage their control over the Supreme Court nomination process into power over candidates for and judges on the Civil Court. This is so because New York has come to have an "informal [chain] of judicial promotion" from state courts of more limited or specialized jurisdiction (such as the Civil Court) to the state Supreme Court bench, of which candidates, judges, and party leaders are all well aware. *See* Testimony of James A. Gardner to The New York State Commission to Promote Public Confidence in Judicial Elections 7, *available at* http://law.fordham.edu/commission/judicialelections (hyperlinks: Public Hearings Information > Buffalo > Sept. 23, 2003); *see also* Sections II.B and III.B *infra*. (This Commission was formed in 2003 by New York State Chief Judge Judith S. Kaye, in part based on "[r]eports of undignified judicial campaign activity in local elections around the State, connections drawn between campaign contributions and judicial decision-making, and attacks on political party control of judicial elections." *See Final Report to the Chief Judge of the State of New York* 1, *available at*

In 2003, Judge López Torres began another campaign for nomination to the Supreme Court. JA 182. In light of adverse publicity, Mr. Norman agreed to forward her name to the screening committee, but he continued to refuse to support her candidacy because of her perceived disloyalty to him. Judge López Torres testified that he explained to her that she did not have enough support—clearly referring to the support of the party leaders rather than the support of the electorate—and that "County" would only support candidates who support "County." *Id.* In an effort to learn the identity of the delegates, so that she could lobby them for support, she wrote to Jeffrey Feldman, Mr. Norman's handpicked second-in-command, over the course of some months. JA 183. When he finally wrote back, less than two weeks before the convention, he chastised her for thinking that the party possessed such a list, belittled her lack of knowledge of election law, and denied her request to address the delegates. JA 183-184, 200-201. Mr. Feldman's letter further accused her of contacting him through an unlawful fax machine that, purportedly, was out of compliance with Federal Communication Commission regulations. JA 201.

Judge López Torres was nominated by two delegates at the judicial nomination convention. However, not surprisingly, Mr. Norman's slate of candidates won. JA 184. The criteria upon which the boss-dominated slate of delegates acted are illustrated in a letter that Ralph Perfetto, a district leader in the Brooklyn Democratic Party, circulated shortly after the convention. Mr. Perfetto wrote that, while there was no question that Judge López Torres was "highly qualified," her refusal to fall in line with the patronage system made her an "ingrate" and thus undeserving of a nomination. JA 184-185, 198. In the eyes of the party leaders, Judge López Torres could not be counted on because she had "courted Vito Lopez to support her for Civil Court, but then

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http://law.fordham.edu/commission/judicialelections (Feb. 6, 2006) (Feerick Commission Final Report).

decided she didn't need him anymore and denied his daughter a job." JA 185, 198.

B. Other Evidence Of Corruption In The System For Selecting Supreme Court Nominees

Testimony in the recent criminal trial of Mr. Norman further illustrates how, in return for bestowing judgeships, Brooklyn Democratic Party leaders have expected to be rewarded—by the judge. This was the third trial of Mr. Norman that the Kings Country District Attorney's Office had successfully prosecuted since 2005. It focused on Mr. Norman's efforts to extort campaign funds from two candidates for nomination to the Civil Court in 2002. *See People* v. *Norman*, Indictment No. 7189/03. The evidence adduced at that trial revealed that Mr. Norman forced judicial candidates to pay for services of vendors used by Mr. Norman in his own campaign for reelection to the State Assembly or risk being "dumped" by him and the party. On the strength of this evidence, the jury convicted Mr. Norman of coercion and grand larceny by extortion.

In 2002, Karen Yellen and Margaret Cammer were, like Judge López Torres, sitting Civil Court judges who were seeking to be reelected to that position. Norman Tr. 787. Marcia Sikowitz was a Housing Court judge seeking election to the Civil Court. *Id.* at 1010-1012. All three sought, and ultimately received, the endorsement of the Democratic Party in Brooklyn, through the approval of Mr. Norman. *Id.* at 1015-1018, 1153-1154, 1272. Mr. Norman directed Judge Sikowitz to run for Judge López Torres's seat. *Id.* at 1158-1159.

As Judges Sikowitz and Yellen testified at trial, and as the testimony of their campaign staffs corroborated, they did not set up or prepare to finance any field operations of their own to gather signatures for designating petitions to win a place on the primary ballot in September. Instead, they reasonably assumed that, because they were party-endorsed candidates, the party organization would include their names on the petitions circulated by the party. Norman Tr. 1019, 1277-1281, 1630, 1749. However, in a series of meetings in July 2002, as the petitioning process was drawing to a

close, Mr. Norman and Mr. Feldman for the first time told the candidates that they were expected to finance a $300,000 joint campaign using vendors designated by Mr. Norman. *Id.* at 1029-1031, 1159-1161, 1283-1284. Judge Cammer dropped out of the race, abandoning her judicial career because she could not afford to continue on those terms. *Id.* at 1163-1164. Her place on the ballot was handed by Mr. Norman to party loyalist Robin Garson, who, with the assistance of the party, succeeded in preventing her opponent from appearing on the primary ballot and thus ran an unopposed race in the primary. *Id.* at 1165-1168, 1198-1199, 1347. As the trial testimony demonstrated, Judges Sikowitz and Yellen were specifically instructed that they must issue joint mailings through one Ernest Lendler and use the services of one William Boone III to distribute literature in "central Brooklyn," which included Mr. Norman's Assembly District. *Id.* at 1053, 1072, 1171-1172. Testimony from Mr. Norman's campaign treasurer revealed that Mr. Lendler also provided campaign services to Mr. Norman's own reelection campaigns, and that Mr. Lendler charged Mr. Norman no interest on long unpaid bills. *Id.* at 2115-2116. For his part, Mr. Boone was Mr. Norman's old friend and worked regularly at Mr. Norman's direction in his Assembly District. *Id.* at 1182. Mr. Boone provided, as he testified, "voter empowerment" services for Mr. Norman in that district, which largely entailed pulling down posters of candidates whom Mr. Norman did not support. *Id.* at 2016-2019, 2065-2066.

Judges Yellen and Sikowitz desperately attempted to salvage their candidacies, although they did not have the campaign resources to finance the joint campaign and they did not believe that the campaign strategy dictated by Mr. Norman made any sense for them. Norman Tr. 1081-1088, 1161-1162, 1189-1190, 1196-1197, 1642-1643, 1664-1665. Mr. Norman informed Judge Yellen that if she did not comply with his plan in full, the party would "dump" her. *Id.* at 1086-1087, 1195, 1323-1324, 1778-1779. Judge Yellen testified that the withdrawal of party support at this crucial phase in the campaign would have been fatal to her chances of getting on the ballot, much less winning the primary, and so she ac-

ceded to Mr. Norman's demands. *Id.* at 1344-1346, 1863. This conduct formed the basis of Mr. Norman's conviction for attempted grand larceny by extortion. *Id.* at 2449.

Mr. Feldman testified that, in the week immediately before the September 2002 primary, he called Judge Yellen's campaign staff at the direction of Mr. Norman and demanded an additional $10,000, allegedly for primary day operations. Norman Tr. 1200-1202, 1797-1799. Mr. Feldman told them at the time that $1,000 of this money was supposed to be spent on primary day operations in Assemblywoman Adele Cohen's district (with the implication, consistent with the requirements of New York Election Law, that such operations were specifically to support Judge Yellen's campaign), while the remaining $9,000 was to go to Mr. Boone for primary day operations throughout central Brooklyn. *Id.* at 1200-1204, 1797-1799; *see also* N.Y. Elec. Law § 17-162 ("No candidate for a judicial office shall, directly or indirectly, make any contribution of money or other thing of value, nor shall any contribution be solicited of him . . . ."). When Judge Yellen's campaign staff attempted to determine whether these amounts were negotiable, or whether they could target where the money would be spent, Mr. Feldman told them—at, he testified, the direction of Mr. Norman—that the party would give no support to Judge Yellen anywhere in the county if they did not use the money exactly as Mr. Norman had demanded. Norman Tr. 1203-1206. Recognizing that losing party support would be fatal to her candidacy, Judge Yellen again acquiesced, although she had already taken out a personal loan to finance her campaign. *Id.* at 1359-1367, 1863. Testimony further exposed that Mr. Boone campaigned only for Mr. Norman in Mr. Norman's Assembly District and later deposited Judge Yellen's $9,000 check in his personal account. *Id.* at 2033-2039, 2100-2103. Assemblywoman Cohen testified that no one told her to spend Judge Yellen's $1,000 check on activities to promote Judge Yellen's campaign and that she spent the check on her own reelection campaign. *Id.* at 1533-1535. The jury found that these actions by Mr. Norman constituted grand larceny by extortion and coercion. *Id.* at 2450.

Revealingly, in the primary that took place the following week, where there were contested Civil Court races, the electorate strongly supported the independent Civil Court candidates: Judge Yellen lost her reelection bid to an independent candidate named Delores Thomas, and Judge Sikowitz lost to Judge López Torres. Norman Tr. 1211-1212. (By contrast, the judicial district convention system denied the public a practical opportunity to nominate or support a challenger candidate for Supreme Court positions.) Judge Yellen nonetheless fulfilled her promise to pay Mr. Boone $9,000 because, as she testified, it was not only her campaign that year for the Civil Court that concerned her. According to Judge Yellen, she understood Mr. Norman's power over the nominations to the Kings County Supreme Court to mean that crossing him would ruin any chance she might have in the future for a seat on that court. *Id.* at 1370-1371; *see also id.* at 1804.

Apart from this prosecution, there are ongoing investigations that the Kings Country District Attorney's Office is conducting into related matters. I am not liberty to disclose the content of such investigations. However, I am persuaded, from my long experience as a prosecutor, voter, citizen, and lawyer, that, corrupt as Mr. Norman's administration was, the problems of corruption in Brooklyn involving Supreme Court judgeships are not attributable to a single corrupt party leader. Rather, as the public record demonstrates, corruption in judicial politics has a long history paralleling the long history of the judicial district convention system.

Indeed, Senator Martin Connor, a New York state senator representing Brooklyn for approximately 30 years, testified below that legendary former Brooklyn party leader Meade Esposito routinely had the ultimate say in who would be the party's nominee for a Supreme Court position and who therefore would win the judgeship. *See* Tr. 2107, 2237-2238. Consistent with this testimony, in an interview recounting the Esposito era, former state Supreme Court justice Thomas R. Jones, who sat on the bench between 1969 and 1985, later admitted that he paid $35,000 in cash to a

Brooklyn district leader, Thomas Fortune, in exchange for his seat, with the knowledge and acquiescence of Mr. Esposito. *See* Ron Howell, *Bench Came at a Price*, Newsday, June 17, 2003, at A3. Explaining that the exchange was "in accordance with the customs and practices of the day," Judge Jones stated that the funds collected through this practice were then distributed among district leaders. *Id.* It is easy to see a direct line between this decades-old practice of using money to buy loyalty within the party and Mr. Norman's contemporary use of Judge Yellen's money to pay his cronies, Mr. Lendler and Mr. Boone. Notably, Judge Jones stated that he eventually distanced himself from the party as much as he could, refusing when asked by party leaders for favors. *Id.* As a result, he believes, he was never appointed by the state's governors to the Appellate Division of the Supreme Court. *Id.*

C. The Link Between Corruption In The System For Electing Justices And Corruption In The Administration Of Justice

According to Judge Jones, when he complained to then-Brooklyn party leader Meade Esposito about being required to pay Mr. Fortune in exchange for a Supreme Court seat, Mr. Esposito told him, "We're gonna put you in the criminal part of the court .... A criminal court judge can sentence a man to 10 to 20, or 5 to 10. Ain't that worth money? ... If you can't make money out of that, you're stupider than I thought." Howell, *Bench Came at a Price*. As this vignette suggests, corruption brought about by the architecture of the Supreme Court nomination system does not necessarily end once the judge is tapped by party leaders to serve on the Supreme Court, or when the judge is elected. It can continue, in the form of corruption in the administration of justice.

Earlier this year, in a case prosecuted by the Kings Country District Attorney's Office, a jury convicted former Supreme Court Justice Gerald Garson on several counts of receiving bribes and official misconduct. *See People* v. *Garson*, Indictment No. 5322/2003. The testimony revealed that Judge Garson had accepted thousands of dollars worth of

gifts from a (now disbarred) lawyer in exchange for giving the lawyer favors, including ex parte advice about a case pending before the judge and private access to the judge's robing room. Judge Garson is currently serving three consecutive sentences totaling three to ten years of imprisonment. *See* Daniel Wise, *Garson Loses Bid to Delay Prison Term During Appeal*, 237 N.Y.L.J. 1 (June 21, 2007). Judge Garson had a long history of leadership in the Brooklyn Democratic Party; before obtaining his Supreme Court seat, he had been a district leader and fundraiser, and had supported Mr. Norman's bid for party leadership when Mr. Norman's predecessor stepped down. *See* Tom Robbins, *Judicial Fever in Brooklyn*, Village Voice, May 6, 2003, at 24.

Several years earlier, in 2002, the Kings Country District Attorney's Office prosecuted Victor Barron, a former Supreme Court justice in Brooklyn, who pleaded guilty to receiving a bribe and was sentenced to a term of three to nine years imprisonment for soliciting $250,000 from a lawyer in exchange for approving a settlement involving a brain-damaged infant. *See People* v. *Barron*, Indictment No. 479/2002; *see also* William Glaberson, *Ex-Brooklyn Judge to Serve at Least 3 Years for Bribe*, N.Y. Times, Oct. 29, 2002, at B3. Judge Barron had risen through the ranks of the Brooklyn judiciary with party support. He was appointed to the Civil Court in 1987 and won election to that court in 1988; in 1998, he was elected to the Supreme Court. *See* William Glaberson, *Former Justice Said to Have Deal on Bribery Plea and Jail Term*, N.Y. Times, Aug. 3, 2002, at B1.[6]

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[6] Brooklyn Supreme Court justices have also been indicted, sanctioned, and/or removed from office for other forms of financial impropriety. For example, in fall 2007, the Kings County District Attorney's Office is scheduled to try Gerald Garson's cousin Michael Garson, also a former Supreme Court Justice and before that a leader in the Brooklyn Democratic Party, on charges that he stole hundreds of thousands of dollars in savings from his elderly aunt to cover his stock market losses. *See People* v. *Garson*, Indictment No. 7068/2004; *see also* Daniel Wise, *NY Judge Who Reportedly Offered to Wear Wire to Set Up Colleague Sees Plea Deal Evaporate*, 237 N.Y.L.J. 1 (June 14, 2007); *Judicial Fever in Brooklyn*. The Appellate Division has already ruled in a civil case that Michael Gar-

Party leaders' control over Supreme Court nominations has given rise to the appearance of impropriety in other contexts in the administration of justice. For example, several high-ranking officials in the Brooklyn Democratic Party have personally benefited from lucrative court appointments made by the judges themselves. A 2001 special inspector's report decried the role of cronyism and party connections in the process of appointing receiverships and guardianships. *See Fiduciary Appointments in New York: A Report to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman*, Executive Summary, *available at* http://www.courts.state.ny.us/ip/gfs/igfiduciary.html. Part of the impetus for this report was the public disclosure of a letter sent to the Law Chairman of the Kings County Democratic Party by two disgruntled attorneys affiliated with the party, explaining that they would no longer represent the party's candidates for office, including judicial candidates, because they were angry that the party had steered receiverships to another party insider instead of to them.[7] *Id.*,

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son must repay the unaccounted-for sum of $163,000, with interest. *See In re Gershenoff*, 793 N.Y.S. 397 (N.Y. App. Div. 2005); *see also* Andy Newman, *Judge Indicted on Charge of Taking Aunt's Money*, N.Y. Times, May 12, 2005, at B2. Earlier, in 2002, the New York State Commission on Judicial Conduct recommended that Reynold Mason, who was at the time a Supreme Court Justice in Brooklyn, be removed from office for misuse of an attorney escrow account. *See In re Mason*, 2002 WL 1477774 (N.Y. Comm'n Jud. Conduct June 21, 2002). Judge Mason, like Judge Barron, had first served as a Civil Court judge, and in 1997 was elected to the Supreme Court. In addition to finding that Judge Mason had failed to cooperate with the investigation and had given false testimony, the Commission found that his misuse of the escrow account began while he was an attorney and continued through his tenure on the bench. As a sitting judge, he improperly used the funds in this account for, among other things, contributions to a political club in Brooklyn. The Court of Appeals unanimously accepted the Commission's sanction recommendation. *See In re Mason*, 790 N.E.2d 769 (N.Y. 2003).

[7] At least one of these lawyers was not even statutorily eligible to be appointed as receiver at all, in that he was the son of a sitting Brooklyn Supreme Court Justice. (The other lawyer had previously served as law secretary to two Brooklyn Supreme Court Justices.) *Fiduciary Appointments in New York*, Appointments in Receivership Cases.

Preface, Attachment B. The letter made clear the expectation that loyal party service was to be rewarded with such appointments. The special inspector's report found that this expectation was anchored in reality. It concluded that a small group of individuals affiliated with the Brooklyn Democratic Party had received a disproportionate number of appointments. *Id.*, Appointments in Receivership Cases. Indeed, the report noted evidence that the Brooklyn Democratic Party had long furnished judges likely to make receivership appointments with a list of "recommended" fiduciary appointees, all of them loyal party members. *Id.* n.16. It noted that this practice had, apparently, ended in the late 1990s, when rumors surfaced of a federal criminal investigation. *Id.*

III. Corruption And Abuse Due To Exclusion Of The Rank-And-File From Any Meaningful Role In Choosing Supreme Court Nominees Are Statewide Problems

Outside of Brooklyn, it is similarly well known that political party leaders have long controlled state Supreme Court nominations. These leaders have exploited that power to consolidate their political authority (including over lesser judgeships and other public offices), to extract political contributions, and/or to obtain personal gain. In some instances, as in Brooklyn, party control over the Supreme Court nomination process has given rise to findings of misconduct or corruption. Accounts of party leaders' improper influence over judicial candidates, sitting judges, and the judicial selection process have been documented in judicial sanction decisions, official commission findings, and news reports. These sources confirm that boss domination of these nominations is not a "Brooklyn" phenomenon but a statewide problem. The result is that rank-and-file party members, who ostensibly are empowered to elect the delegates who in turn select party judicial nominees, are functionally disabled from influencing this process throughout the state.

A. Party Leaders' Control Over Supreme Court Nominations Is A Statewide Problem

Testimony and documents submitted below and other public sources attest that party leaders outside of Brooklyn have similarly exploited New York State's restrictive ballot access requirements and judicial convention rules to exercise unilateral power over Supreme Court nominations. In the Ninth Judicial District, for example, an Orange County Republican Party leader and longtime delegate to the Republican Party judicial convention averred that "the *only* path [to obtain the Republican Party's nomination] is to obtain the support of his or her county Party chairman and then seek the blessing of the Westchester County chair." JA 244. Similarly, in the Seventh Judicial District, party leaders exercised complete control over such nominations, as illustrated by former Rochester City Court Judge John Regan's testimony about his futile efforts at obtaining a Republican nomination to the Supreme Court. JA 232-235; *see also* JA 234 (testifying that, without party sponsorship, a candidate lacked even "a realistic opportunity to compete" for consideration by voters). As the District Court aptly put after reviewing such evidence, in New York, "the local major party leaders—not the voters or the delegates to the judicial nominating conventions—control who becomes a Supreme Court Justice and when." Pet. App. 95.

Several reported judicial disciplinary decisions reinforce the control that party leaders have over judicial appointments and the interest that judges have in currying favor with these leaders. In 1994, the New York State Commission on Judicial Conduct censured Bronx Supreme Court Justice Barry Salman for violating New York's judicial conduct rules limiting the political contributions by judges. As Justice Salman admitted in that proceeding, while campaigning for a full term on the Supreme Court as an elected Civil Court judge, he had authorized his campaign committee to purchase $2,400 in tickets to the "annual dinner of the Bronx County Democratic Committee" and to donate $6,750 to three Democratic Party committees in the Bronx. *See In re Barry Salman*, 1994 WL 897717, at *1 (N.Y. Comm'n Jud.

Conduct Jan. 26, 1994). Justice Salman was rewarded for that display of loyalty—in 1990, he was chosen by the Bronx County party leaders for a nomination to the Supreme Court, which ensured his election to that seat. He still serves on the Supreme Court today. *See New York Judge Reviews and Court Directory* 7 (2007-2008 ed.).

Similarly, in 2004, the Commission on Judicial Conduct admonished Amherst Town Justice Mark Farrell for violating judicial conduct rules limiting political activities and contributions, based on various steps he took in an attempt to gain the Democratic nomination for a Supreme Court seat in Erie County. *See In re Mark Farrell*, 2004 WL 1813745, at *2 (N.Y. Comm'n Jud. Conduct June 24, 2004). Aware that his chances to obtain the nomination hinged on the support of the Democratic Party leader in that county, Justice Farrell acquiesced to a demand by the county chairman to contact members of the county Democratic Committee to solicit support for the chairman's reelection. Justice Farrell called 50 committee members and spoke to 20 of them on behalf of the chairman. *Id.* at *1. To further assist and thereby gain the support of the county leadership, he also contributed $7,500 of his campaign funds to the Erie County Democratic Committee. *Id.* He, too, still serves as a town justice. Elected Officials of Amherst Township, *available at* http://www.amherst.ny.us/contact/electa.asp (last visited July 12, 2007).

The 1988 Reports of the New York State Commission on Government Integrity reinforce the statewide nature and the long history of these problems. That Commission was created by then-Governor Mario Cuomo to address widespread concerns about, among other things, the integrity of the judicial nomination process. *See* Executive Order 88.1 ¶ 2.7 (Apr. 21, 1987) (charging the Commission with responsibility for investigating "weakness in existing laws ... regarding the selection of judges to determine whether such weaknesses create an undue potential for corruption, favoritism, [and] undue influence"). Following an extensive investigation that included "interview[s with] approximately 50 sitting and former judges around the state, and more than 60

experts, political figures, spokespersons for various organizations concerned with judicial selection, and other individuals," the Commission issued a 31-page report setting forth its findings on the judicial nominations process. *Government Ethics Reform for the 1990s: Collected Reports of the New York State Commission on Government Integrity* 272 (Bruce A. Green ed. 1991); *see also id.* at 267-301.

The Commission found that the state's restrictive ballot access rules for the Supreme Court nominations process often rendered voters' "right to determine their parties' candidates, and, ultimately officeholders . . . meaningless." *Government Ethics Reform* 269 (internal quotation marks omitted). It stated that party leaders' control over the nominations process "eliminate[d] from consideration the vast majority of able candidates," making "the selection of talented judges a matter of pure happenstance," and "also undermine[d] confidence in the ability of judges to serve fairly and impartially after they are elected." *Id.* at 268. It found that a judicial candidate or a sitting judge's ability to win or to keep a Supreme Court seat depends on his or her "past service to the party organization" and efforts to "maintain favor of the party" leadership. *Id.* at 268, 280. Further, when judicial candidates run against the party leaders and win primaries, they "sometimes pay a price" for their independence and lose the opportunity to reach the Supreme Court. *Id.* at 278.

In Queens County, for example, a judge who ran for the Civil Court in defiance of leaders of the dominant Democratic Party was left languishing "for many years" on the Civil Court bench, even as "many other Civil Court judges with fewer years of judicial experience" were elevated to the Supreme Court. *Government Ethics Reform* 278. The Commission recounted that that experience had taught the judge an important lesson—one who aspires to a seat on the Supreme Court should not "make enemies with people who determine whether you get redesignated," i.e., the party leaders. *Id.* (internal quotation marks omitted). The Commission found that Queens County was far from unique in this respect; instead, it was "in important ways representative of . . . other areas" in New York. *Id.* at 276.

B. Party Leaders Exploit Supreme Court Nominations In A Variety Of Ways

Local party leaders have exploited their control over Supreme Court nominations as a means of determining who is appointed to other judicial or political positions, of controlling the conduct of judges in office, and of enhancing their fundraising. *See Government Ethics Reform* 280 ("party leaders [saw] the tremendous power they exercise over judgeships [as] first and foremost a political asset, not a public trust"); *see also id.* at 284-288.

Controlling appointments to other courts: As reported by the New York Times, on at least four occasions between 1991 and 1998, leaders of the Bronx County Democratic Party used nominations to the Bronx County Supreme Court as a means of placing their favored candidates for other offices on the general election ballot, without those candidates having to win a primary vote. *See* David Halbfinger, *Party Boss Has Firm Grip on Judgeships*, N.Y. Times, Oct. 19, 1998, at B1. This is possible because, under New York Election Law, the judicial nominating conventions where Supreme Court nominees are formally chosen take place after the primaries for Civil Court are held. This sequence enables party leaders to tap successful Civil Court nominees for Supreme Court positions, and then to act unilaterally to fill the resulting Civil Court seat. In 1991, for example, the Bronx County Democratic Party leader nominated a former City Councilman to a Supreme Court seat merely ten days after that Councilman had won a primary for the Civil Court. The resulting vacancy on the Civil Court ballot allowed the county leader to handpick a nominee for the Civil Court bench, who otherwise would have had to win a primary. *Id.* In 1994 and again in 1997, veteran politicians were given state Supreme Court nominations shortly after they had won primaries for the New York General Assembly—enabling the local party leader to pick the replacement nominees for the General Assembly without giving the rank-and-file an opportunity to vote on those candidates. *Id.* Finally, on August 1, 1998, Judge Peggy Bernheim abruptly retired from the Civil Court bench. This was "ideal" timing

for the Democratic Party county leader because it allowed him to handpick the party's nominee to succeed Judge Bernheim in the general election, without giving the rank-and-file voters a choice.[8] The serendipitous timing of Judge Bernheim's retirement was made even clearer the next month, when she "un-retired" to accept a nomination to the Bronx County Supreme Court. *Id.*

Controlling actions of judges in office: Local party leaders' control over state Supreme Court nominations has also enabled them to influence sitting judges' administrative decisions. As the Commission on Government Integrity found, party leaders often expect to have control over judges' personnel decisions—the "protocol" described by Clarence Norman to Judge López Torres, *supra*, p. 12. *Government Ethics Reform* 278. A Queens County judge admitted to the Commission "attempt[ing] to win [the party leaders'] good graces" by choosing his law secretaries based on the recommendations from the Democratic Party leaders in Queens County. *Id.*

Concerns about how party leaders may react—including whether they would withhold nomination or re-nomination—may also influence judges' decisions on the bench. In his testimony before the Commission on Government Integrity, a state Supreme Court justice acknowledged that if he had to decide a case involving the law partner of a political leader, the impact of adverse outcome on his re-nomination would weigh on him: "I'm human. . . . I would think about it. I would struggle with [the prospect that] I'm going to kill myself for the next election." *Government Ethics Reform* 287 (internal quotation marks omitted). As that Commission concluded, the necessity of securing the party leaders' support for re-nomination "can have a chilling effect on a judge's exercise of his [or her] duties." *Id.* at 286.

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[8] Had Judge Bernheim retired three weeks sooner, rank-and-file party members would have had the opportunity to vote on a nominee; had she retired on or after August 5, the Mayor of New York City would have had the right to appoint an interim successor for the next year. *See* N.Y. Elec. Law § 6-148(3); N.Y. City Civ. Ct. Act § 102-a(3).

Enhancing party fundraising: Local party leaders also have leveraged their control over Supreme Court nominations into an effective fundraising tool, as the episode leading to Justice Salman's censure illustrates. It is common for sitting judges, judicial candidates, their families, and courthouse employees to purchase tickets to political fundraisers, often costing several hundred dollars a ticket. *Government Ethics Reform* 285. Indeed, to circumvent the judicial ethics rules that ordinarily forbid judges from purchasing such tickets, judges would "sometimes announce their candidacies for another vacancy" on the same bench; this nominally enabled them to come within an exception that permits certain political donations by persons then running for office—and thereby to make donations to party leaders. *Id.* at 285.[9]

C. Party Leaders' Control Over Supreme Court Nominations Has Defied Repeated Calls For Reform

Affirmance of the decision below voiding New York State's judicial district nomination system is, finally, merited because New York State political leaders have proven durably unwilling and unable to reform this broken, corrupt, and unconstitutional system.

Boss domination of the judicial nomination process has been recognized for decades. As long ago as 1944, concerns about such control of judicial district nominating conventions by party leaders prompted the New York Times to call on the state legislature to reform a system in which the "choice of boss-manipulated conventions" was the only one that mattered. *See Ask Legislature to Act on Courts*, N.Y. Times, Feb. 28, 1944. As the Court of Appeals recognized below, the ensuing decades were full of known instances in which cele-

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[9] Practicing lawyers who regularly appear before the Supreme Court Justices and receive guardianship and receivership appointments are also a mainstay of party-sponsored fundraisers. An analysis of Queens County campaign finance records for 2002 showed that close to 40% of the funds raised by the Queens County Democratic Party came from people associated with the courthouse, including practicing lawyers and court personnel. *See* Clifford J. Levy, *Where Parties Select Judges, Donor List Is a Court Roll Call*, N.Y. Times, Aug. 18, 2003, at A1.

brated bosses unilaterally selected Supreme Court justices, often with little or no regard to their juristic merit. *See* Pet. App. 29 ("reports and newspaper editorials from [1944] forward have decried an electoral practice 'that mocks choice,' and criticized a system in which 'voters can never know the candidates and have to accept party slates,' while the 'real choice is . . . left to political bosses'"). And by the late 1980s, the public's dissatisfaction with the system was sufficiently evident and the need for reform sufficiently apparent to lead Governor Cuomo to found the Commission on Government Integrity. But even that Report, with its strongly worded conclusions, did not lead to change.

Today, the public remains disenchanted by the system. In a December 2003 survey, a majority of registered voters in New York deemed it "very important" for judges to be independent from political party leaders, while an additional 34% deemed it "important." *See* Feerick Commission Final Report Appendix E at 18. Fully 86% of these voters believed that political party leaders had either "a great deal" (48%) or "some" (38%) influence over who became judges, more than campaign contributors (39%), voters (36%), or special interest groups (31%). *Id.* at 16-17. But, other than the prospect of judicially mandated reform as embodied by the decisions and orders of the courts below, there is no prospect or political impetus for reform— especially when the very legislators who could implement reform are frequently the county-level party leaders (e.g., former Assemblyman Clarence Norman) who benefit the most from the status quo. As Justice Steven Fisher, the chief administrative judge of the Queens County Supreme Court, has succinctly explained, "parties, like any institution, are not eager to give away power and influence," and they will oppose and seek to block any "change in the system that would diminish their influence." Levy, *Where Parties Select Judges.*

CONCLUSION

For the foregoing reasons, as well as for the reasons contained in the Respondents' brief, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

—v.—

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF EDWARD I. KOCH AS *AMICUS CURIAE* FOR AFFIRMANCE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF *AMICUS CURIAE* INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. Party Leaders, Not Voters, Select Justices of the Supreme Court	2
II. The Unconstitutional Infringement upon Voters and Candidates' First Amendment Rights Is the Inevitable Consequence of New York's Election Statute	5
III. New York's Convention System for State-Wide Office Belies the Argument that the Second Circuit's Holding Imperils All Convention Systems	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases PAGE

Norman v. Reed, 502 U.S. 279 (1992) 10

Statutes

N.Y. Elec. L. § 6-104 ..... 8, 9

N.Y. Elec. L. § 6-106 6

N.Y. Elec. L. § 6-124 6

N.Y. Elec. L. § 6-136 9

Other Authorities

Ambrose Bierce, *The Devil's Dictionary* 172 (NuVision Publ'ns 2007) 4

Declaration of Independence 2

Federalist No. 10 ..... 4, 5

Feerick Comm'n, Final Report to the Chief Judge of the State of New York (Feb. 6, 2006) 6, 7

Interview by Ed Edwin with Edward I. Koch, Columbia University Oral History Research Office (Dec. 13, 1975) 3

STATEMENT OF *AMICUS CURIAE* INTEREST OF EDWARD I. KOCH

I file this brief as an *amicus curiae* in support of Respondents.[1]

My political career began in 1956 when I moved to Greenwich Village and volunteered for the presidential campaign of Adlai Stevenson. In 1963, I became the Village's Democratic Party district leader and was subsequently elected to New York City Council (1966) and U.S. Congress (196[illegible]1977). I won election as mayor of New York in 1977 and was reelected in 1981 and 1985. One of my significant achievements as mayor was to implement a merit selection system for criminal and family court judges.

My involvement in all levels of New York politics for the past fifty years has provided me with a unique insight into the election and appointment of public officials in this state. Unfortunately, my personal experiences and observations echo only too accurately the lower courts' conclusions regarding the convention system.

"We mean by 'politics,' " Adlai Stevenson once said, "the people's business—the most important business there is." In my opinion, these words still ring true. I began my political career as a reformer, seeking to undermine the grasp of overweening party leaders on

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of the State of New York, have filed letters with the Court consenting to all amicus briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than amicus or his counsel, has made a monetary contribution to the preparation or submission of this brief.

local politics. With these pages, I hope to continue a campaign begun five decades ago against those political leaders who arrogate to themselves choices belonging to the people.

SUMMARY OF ARGUMENT

The reality of election of Justices of the Supreme Court of New York is clear. There can be no serious factual dispute by anyone who has been involved in the system. As much as Petitioners try to shift the focus into an abstract First Amendment conversation on convention systems, the facts remain unchanged (as they have for decades): New York's statutory election scheme creates, fosters, and nurtures a system whereby the very few appoint the Justices. The United States Court of Appeals for the Second Circuit recognized this. Its holding does not signal an end to convention systems in general or even to all convention systems in New York; instead, it appropriately tolls the knell for a one-of-a-kind statutory scheme that has deprived voters and candidates of meaningful participation in the election of New York's Supreme Court Justices.

ARGUMENT

I. Party Leaders, Not Voters, Select Justices of the Supreme Court

One of the charges against King George III listed in the Declaration of Independence was that "[h]e has made Judges dependent on his [w]ill alone." A similar grievance could be leveled today against New York's local party leaders. As I once pointed out in a 1976 interview, justices of the Supreme Court in New York

are not elected, even though their names are on the ballot. They are selected.[2]

I witnessed first-hand the influence of county and district leaders when I became involved in Democratic clubs in Greenwich Village during the 1950's and '60's. At that time, the county and district leader, Carmine DeSapio, ruled over the New York County Democratic Party known as "Tammany Hall." As a member of the Democratic club in the Village over which DeSapio presided, I saw how the patronage system flourished in one of this country's most influential and disreputable political machines. DeSapio played kingmaker and, in addition to selecting judges, was reputed to have handpicked the Democratic Party's candidates for New York City mayor and governor of New York. I became familiar with the mechanics of judicial selection in New York City, by, among other things, attending meetings of district leaders at which judgeships were parceled out—sometimes with an eye to ethnic "quotas" and often as a response to political obligations. While the party leaders' power to select candidates for mayor and governor has waxed and waned over the years as a function of the party leaders' influence, New York's Election Law ensures that a "DeSapio" will always handpick New York's Supreme Court Justices.[3]

Petitioners can only envision an "unalterable political reality" in which "party leaders can and should have enormous influence." (Brief of Petitioners N.Y. County Democratic Committee et al. at 30.) They write of the First Amendment rights of "the party" as if the cabals of

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[2] Interview by Ed Edwin with Edward I. Koch, Columbia University Oral History Research Office, at 52 (Dec. 13, 1975), *available at* http://www.columbia.edu/cu/lweb/digital/collections/nny/koche/toc.html.

[3] *See* infra Part II.

a few, empowered by the state, trump the associational rights of all rank-and-file party members. To suggest that party leaders are synonymous with the party is simply arrogance. Surely the suffrage of party members means something more than "the right to vote for the man of another man's choice."[4]

I and like-minded reformers challenged this undemocratic vision of politics and Tammany Hall's subversion of the election process by becoming involved in a reform club—the Village Independent Democrats ("VID")—in late 1956/early 1957. Democratic reformers from around the state joined forces to elect VID district leaders, a position which I occupied in the Village from 1963 to 1965.

The VID was much more open and less hierarchical than its Tammany Hall predecessor; but, even under the VID, the selection of Supreme Court Justices remained in the hands of party leaders. We could have done little to make the election scheme of Supreme Court Justices more democratic because New York's Election Law insulated the process from rank-and-file party members.

Petitioners' briefs suggest that New York convention system for Supreme Court Justices rises to the lofty ideal expressed by Alexander Hamilton in Federalist No. 10, in which republic institutions may "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country. . . ." THE FEDERALIST No. 10. Whatever the intention of New York's legislature in designing the system, the reality of New York's statutory scheme could not be further from Petitioners' abstract discussion. The risk to republican

[4] Ambrose Bierce, *The Devil's Dictionary* 172 (NuVision Publ'ns 2007).

institutions recognized by Hamilton has become the reality of New York's judicial conventions, where "[m]en of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people." *Id.*

Despite Petitioners' efforts to argue otherwise, this case does not concern whether the First Amendment accords protection to the internal process, independent of a statutory scheme, by which a political party selects its standard bearer. To frame the issue this way is to divorce the factual reality as it exists (and has existed since I have been involved) and was found by the trial court, and transforms the issue into a hypothetical First Amendment analysis. Who is to say that Judge Lopez Torres—who had won two county-wide elections for judicial office—did not better represent her party than a leader whose disfavor Judge Lopez Torres had incurred by failing to participate in a patronage system? My 50 years as a member of the Democratic Party leads me to believe that Judge Lopez Torres represents the Democratic Party's ideologies and preferences more accurately than the political boss of whom she ran afoul.

II. The Unconstitutional Infringement upon Voters and Candidates' First Amendment Rights Is the Inevitable Consequence of New York's Election Statute

New York's convention system for electing Supreme Court Justices has gone largely unchanged for the forty-plus years that I have been familiar with it. The undemocratic, boss-run system that I observed in the 1960s appears to operate no differently today than it did back then. Surely it is not happenstance that no Democratic or Republican insurgent candidate has ever been nominated

under this system, absent a massive split within the party's leadership.

This is because the First Amendment violations found by the Second Circuit result not from private individuals' political power but from the overly burdensome combination of Sections 6-106 and 6-124 of the New York Election Law. In other words, they are inherent in the statutory scheme.

A report issued by the New York State Commission to Promote Public Confidence in Judicial Elections ("Feerick Commission Report"),[5] recently authored by a Commission that included ten sitting or former New York judges and several former state legislators, unequivocally supports this conclusion. In particular, the Feerick Commission Report noted that delegates lack the opportunity to meaningfully elect candidates for Supreme Court Justice. Under New York law, the delegates are in office for only one or two weeks before the parties hold their judicial nominating conventions, after which their job is over. The Feerick Commission wrote,

> Delegates do not have time to interview judicial candidates, to investigate the reports of bar association screening panels or to learn the skills required to perform their duties. Moreover, the fact that delegates are required to run annually fails to provide an incentive to pull individual public-spirited citizens into the race for the office of delegate.

(Feerick Commission Report at 25.) Indeed, my experience echoes these findings. Delegates are generally party club faithfuls who agree to serve as delegates as a favor to their clubs. They license their names for use by the party leaders. Given the delegates' interest in following

[5] Dated February 6, 2006 and available at http://law.fordham.edu/commission/judicialelections/images/jud-finreport.pdf.

the local party leadership, their votes are often determined before they even set foot in the convention.

Second, the Election Law's petitioning provisions favor "institutional party support" by requiring the collection of thousands of signatures across multiple assembly districts. (*Id.* at 26-7.) Third, large numbers of delegates during the quick-paced conventions "all but guarantee that deliberate, thoughtful action will be foreclosed." (*Id.* at 26.) There exists a "near-total vacuum of information about judicial candidates," and delegates merely "rubber stamp[ ] decisions already reached by political party insiders." (*Id.* at 19.) It was because the Election Law excluded rank-and-file members from any meaningful participation in the nomination and election of Supreme Court Justices that the Feerick Commission proposed changes to the Election Law, itself. (*Id.* at 28-9.) It is nothing less than *chutzpah* for the defendants to champion that report on account of its recommendation that the convention system be left in place with some modest revisions, rather than abolished altogether. (Brief of Petitioners N.Y. County Democratic Committee et al. at 3.)[6]

Despite the overwhelming evidence to the contrary, Petitioners' amicus curiae, The Republic National Committee wrote that "[t]here is nothing to stop rank-and-file party members from running to be convention delegates." (Brief Amicus Curiae of the Republican National Committee in Support of Petitioners at 12.) There is "nothing" to stop them but a difficult petitioning process

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[6] Although my political experiences largely echo the Feerick Commission Report's conclusions, I disagree with the Commission's recommendation that a convention system be left in place. With due respect to the Commission, I have been in and around politics long enough to know that tinkering with a system as deeply flawed as this one will not cure it.

leading to a brief position as one uninformed decision-maker among many. In fact, New York's Election Law could hardly be more discouraging towards rank-and-file party members who seek to have a meaningful voice as convention delegates. Petitioners write that "[t]he only direct say voters have in this process [of nominating Supreme Court Justices] is in the selection of the delegates who serve as voters' party representatives in the judicial nominating process." (Brief of Petitioners N.Y. County Democratic Committee et al. at 22.) Given the marginalization of delegates, a voter's voice in the nomination of Supreme Court Justices cannot rise above an inaudible and ineffective whisper.

III. New York's Convention System for State-Wide Office Belies the Argument that the Second Circuit's Holding Imperils All Convention Systems

Although Petitioners argue that the Second Circuit's opinion places all "conventions for state, local and national office . . . in jeopardy," (*id.* at 20), the Second Circuit clearly stated that "a convention-based system is, in the abstract, a perfectly acceptable method of nomination." However it correctly rejected the notion that "all such systems, regardless of how they are implemented, are constitutional." (Pet. App. at 46.)

In fact, New York uses a convention system to select party candidates for "any office to be filled by the voters of the entire state." N.Y. Elec. L. § 6-104. The positions of governor and state comptroller are filled according to this statute. But it is telling that this system differs from and lacks the infirmities of the convention system used to nominate Supreme Court Justices. For party candidates for a state-wide office, the "person receiving the majority vote shall be the party's designated candidate for nomination. . . ." *Id.* Even if a candidate fails to win the majority vote, he may appear as a

party candidate on the primary ballot if he receives at least twenty-five percent of the votes at the convention. *Id.* Assuming that a party candidate does not win even twenty-five percent of the votes at the convention, he may nonetheless petition onto the primary ballot by obtaining the signatures of the lesser of fifteen thousand or five percent of the party's enrolled voters, provided that the lesser of one hundred or five percent of these signatures come from voters residing in one-half of the state's congressional districts. *Id.* § 6-136(1). In contrast, Judge Gleeson found that a challenger candidate for the Supreme Court in Brooklyn or Staten Island would need to gather 24,000 to 36,000 signatures drawn equally from 24 Assembly Districts in order to run a slate of delegates. (Pet. App. at 108.)

By offering these two mechanisms for party candidates to appear on the primary ballot (in addition to the possibility of winning a majority of votes at the convention), New York's convention system for state-wide office ensures that a *de jure* election does not turn into a *de facto* appointment. Moreover, New York's choice of a less burdensome convention system for positions as important as governor belies the argument that the judicial nominating convention necessarily "advances the important First Amendment right of the party and its members to associate with candidates who, the party has determined, reflect the party's ideals." (Brief of Petitioners N.Y. County Democratic Committee et al. at 32.) If the party's convention system for state-wide offices enables party leaders to organize the rank-and-file and endorse candidates whom they feel best advance the goals of the party—all while respecting the associational rights of the party's rank-and-file—then what is the compelling state interest behind the "byzantine and onerous network of nominating phase regulations" (Pet. App. at 69) characteristic of elections for Supreme Court Jus-

tice? Petitioners offer no valid reason—and I can think of none—for the disparity in statutory burdens between conventions for Supreme Court Justice and other judicial and non-judicial offices. *See Norman v. Reed*, 502 U.S. 279, 294 (1992) (finding no "serious state interest" or "narrow" tailoring of statute where disparity existed between laws providing right of access to state as opposed to county ballots).

CONCLUSION

For the above reasons, along with those urged in the Respondents' brief, I respectfully request this Court to uphold the order and decision of the United States Court of Appeals for the Second Circuit.

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No. 06-766

In The Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, ET AL.,

Petitioners,

v.

MARGARITA LOPEZ TORRES, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICI CURIAE LAW PROFESSORS GUY-URIEL E. CHARLES, ERWIN CHEMERINSKY, KAREEM CRAYTON, STEVEN P. CROLEY, HEATHER K. GERKEN, MICHAEL KANG, ELLEN D. KATZ, ETHAN J. LEIB, MICHAEL PITTS, AND DANIEL P. TOKAJI IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
THE PROCESS NEW YORK STATE EMPLOYS TO NOMINATE STATE TRIAL JUDGES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS	4
A. A STATE'S NOMINATING PROCESS MAY NOT DENY PARTY MEMBERS A REALISTIC OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF THEIR PARTY'S CANDIDATES	6
B. NEW YORK STATE'S NOMINATING PROCESS DENIES PARTY MEMBERS A REALISTIC OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF THEIR PARTY'S CANDIDATES	13
C. NEW YORK STATE'S NOMINATING REGIME ADVANCES NO LEGITIMATE OR COMPELLING STATE INTEREST	21
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Am. Party of Tex. v. White, 415 U.S. 767 (1974) 19, 20, 22, 23

Bachur v. Democratic National Party, 836 F.2d 837 (4th Cir. 1987) 27

Bullock v. Carter, 405 U.S. 134 (1972) ..... *passim*

Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) ... *passim*

Clingman v. Beaver, 544 U.S. 581 (2005) 18

Cousins v. Wigoda, 419 U.S. 477 (1975) 8, 25, 26

Democratic Party of the United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981) 25, 26, 27

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) 7, 23, 25, 26

F.E.R.C. v. Mississippi, 456 U.S. 742 (1982) 29

Jenness v. Fortson, 403 U.S. 431 (1971) 19

Kusper v. Pontikes, 414 U.S. 51 (1973) 7, 10, 22

LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir. 1998) 27

Lubin v. Panish, 415 U.S. 709 (1974) 7, 11, 15, 18, 19

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) 10

Nixon v. Condon, 286 U.S. 73 (1932) 6, 9, 17

Nixon v. Herndon, 273 U.S. 536 (1927) 6, 9

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 21

Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (*en banc*) 23, 27

TABLE OF AUTHORITIES – Continued

Page

Smith v. Allwright, 321 U.S. 649 (1944) 6, 9

Smith v. Doe, 538 U.S. 84 (2003) 29

Storer v. Brown, 415 U.S. 724 (1974) 22

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 23

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) ..... *passim*

Terry v. Adams, 345 U.S. 461 (1953) 6, 9, 10

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 7

United States v. Classic, 313 U.S. 299 (1941) 6, 9, 11, 14, 19

Williams v. Rhodes, 393 U.S. 21 (1968) 17

CONSTITUTIONAL PROVISIONS AND STATUTES

N.Y. Const. art. VI, § 6(c) 13

N.Y. Elec. Law § 6-106 ..... 13, 16

N.Y. Elec. Law § 6-124 ..... 13, 14, 16, 17

N.Y. Elec. Law § 6-126 14

N.Y. Elec. Law § 6-134(4) 14

N.Y. Elec. Law § 6-136(2)(i) 14, 16

N.Y. Elec. Law § 6-136(3) 14, 16

N.Y. Elec. Law § 6-158(5) 14, 18

N.Y. Elec. Law § 6-160(2) 14

INTEREST OF AMICI CURIAE

The law professors named below teach and write about elections, voting rights, political parties, and electoral competition. Both basic and advanced law courses on voting and elections, as well as a wide range of scholarship on these subjects, regularly considers state authority to regulate conduct by political parties, candidates for office, and individual voters. Amici are among the many scholars who write and teach about the issues before the Court in this case.

Based on this expertise, and on careful review of this Court's decisions, amici argue in this brief that the nominating process the State of New York employs to select nominees for state supreme court justice violates the First and Fourteenth Amendments. Amici join this brief solely on their own behalf and not as representatives of their universities.[1]

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all amicus briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

States need not make judicial offices elective, but those that opt to do so may not lock their citizens out of the electoral process. This is precisely what the State of New York has done. It mandates a nomination process that facially invites party members to participate in the selection of candidates and then imposes a series of structural barriers that functionally rescind the invitation. The regime effectively excludes all candidates except those hand-picked by party leaders and impermissibly denies members of political parties a realistic opportunity to participate in the selection process.

Part I of this brief argues that members of political parties possess constitutionally grounded interests in

participating in the selection of their party's candidates. Precedent of longstanding identifies significant limits on state power to restrict such participation. Among these limits is that states may not deny members of political parties a realistic opportunity to participate in the selection of their party's candidates.

Part II of this brief argues that the cumbersome regime New York State employs to nominate its state trial judges denies party members this opportunity to participate. The process is burdensome not because it dispenses with a direct primary or because it relies on a political convention as a component of the process. Instead, the burden arises from the combined operation of critical components of New York's intricate nominating regime.

Under this regime, bona fide party members who meet the qualifications for judicial office and enjoy considerable public support but are not favored in advance by party leadership are unable to clear all the state-imposed hurdles necessary to elect supportive convention delegates, and are unable to lobby meaningfully the delegates who are selected. Party members interested in the nomination of such judicial candidates cannot vote for delegates who might support their nomination, given that no such delegates appear on the primary ballot, and the primary election itself is routinely cancelled due to lack of contest. The burden that results is severe.

Part III of this brief shows that the system New York State employs to nominate state trial judges is unconstitutional because it is not sufficiently related to the achievement of any legitimate or compelling government purpose. The regime deprives party members of any meaningful opportunity to participate in the selection of candidates and thus undermines the associational interests it is said

to protect. It makes judicial candidates beholden to party bosses and thus damages rather than enhances judicial independence and confidence in the judiciary. The regime simply fails in practice to promote diversity in the judiciary. These failings are compounded by an opaque and misleading process that obscures the power it lodges with party leaders. New York State may not both expressly invite participation in the nomination process by the party rank and file and then impose a series of requirements that ensure this opportunity for participation will be meaningless.

ARGUMENT

THE PROCESS NEW YORK STATE EMPLOYS TO NOMINATE STATE TRIAL JUDGES VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

The Court of Appeals described the process New York State employs to elect its state trial judges as a "network of restrictive regulations [that] effectively *excludes* qualified candidates and voters from participating in the primary election and subsequent convention." Pet. App. 53.[2] The appellate court held that this state-mandated nominating process infringes the First and Fourteenth Amendment rights of both voters and candidates seeking access to the process. *Id.* at 85.

That judgment should be affirmed. New York State need not elect its state supreme court justices, and sound policy reasons would support a decision to dispense with

[2] "Pet. App. __" refers to the opinions of the Second Circuit (Pet. App. 1a-92a) and district court (Pet. App. 93a-185a).

such a practice. But if there are good reasons to elect judges, New York State's system does not reflect any of them. Insofar as judicial elections make judges accountable to the people and not to established institutions, New York State's system makes them beholden to party bosses. Insofar as elections make judicial accountability transparent, New York State's system obscures the connection between the elected and the electorate and surreptitiously lodges power in the proverbial smoked-filled back room. Insofar as elections promote vibrant political parties, New York State's regime usurps the autonomy of political parties to structure decisionmaking for themselves. In all, a worse system for electing judges is difficult to imagine.

The judgment below identifies a clear and circumscribed limit on state power to regulate the activities of political parties. Specifically, it provides that states that choose to have judicial elections may not deny party members a realistic opportunity to participate in the nomination of their party's candidate. Under this test, a state may not simultaneously mandate a nominating process that calls for delegate selection by voters in a party primary and then impose a series of structural obstacles that effectively exclude bona fide party members from meaningful participation.

The judgment below does not call into question state power to mandate nomination by convention or to employ hybrid systems that combine an indirect primary with a nominating convention, so long as such systems lack the state-imposed obstacles to participation the court found to inhere in the New York scheme. Finally, the judgment below says nothing whatsoever about the power of a political party itself to restrict participation by its rank and file membership in a nominating process. The power

of a political party to impose such restrictions is not at issue in this case.

What is at issue is a state's power to stage judicial elections so as to nullify the participation of party members. When a state opts to make a judicial office elective, it may not deny party members a realistic opportunity to participate in the selection of their party's candidates. A state may not invite its citizens to vote and then lock them out. Yet that is precisely what the State of New York does in mandating a process that formally invites such participation but functionally excludes all candidates except those hand-picked by party leaders. The Court of Appeals held that the Constitution prohibits the State from imposing such a system. This Court should affirm that judgment.

A. A STATE'S NOMINATING PROCESS MAY NOT DENY PARTY MEMBERS A REALISTIC OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF THEIR PARTY'S CANDIDATES.

This Court has long recognized that members of political parties possess constitutionally grounded interests in participating in their party's nomination process. Precedent identifies significant limits on state power to restrict such participation.

At the most basic level, states may not engage in fraud when counting ballots cast by party members in state-administered primaries. *See United States v. Classic*, 313 U.S. 299 (1941). States may not exclude or facilitate the exclusion of party members from party primaries based on their race, *see Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S.

536 (1927), or based on a party member's past participation in the primary of another political party, *see Kusper v. Pontikes*, 414 U.S. 51, 61 (1973). Nor may states impose onerous filing fees that functionally deny potential candidates access to the primary ballot. *See Lubin v. Panish*, 415 U.S. 709, 718 (1974); *Bullock v. Carter*, 405 U.S. 134, 146 (1972).

Limitations on state power to restrict participation in a party's nomination process reflect the fact that the nomination process constitutes "the crucial juncture at which the appeal to common principles may be translated into concerted action." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). The Court has consequently recognized that party members possess concrete participatory and associational interests in taking part in that process free from state interference. *See, e.g.*, *Pontikes*, 414 U.S. 51, 58 (1973) ("A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in [the candidate] selection process."); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575, 586 (2000) ("the moment of choosing the party's nominee" is when "party *members* traditionally find their collective voice and select their spokesman") (emphasis added); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 230-31 (1989) (emphasizing as particularly strong "the associational rights at stake" when "party *members* . . . seek to associate . . . with one another in freely choosing their party leaders.") (emphasis added); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 371 (1997) (Stevens, J., dissenting) ("The *members* of a recognized political party unquestionably have a constitutional right to select their nominees for public office") (emphasis added); *Tashjian*, 479 U.S. at 235-36 (Scalia, J., dissenting) ("The ability of the *members* of

the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom") (emphasis added); *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975) (Rehnquist, J., concurring in result) ("[A]t the very heart of the freedom of assembly and association" is "[t]he right of *members* of a political party to gather in a . . . political convention in order to formulate proposed programs and nominate candidates for political office.") (emphasis added).

In the present case, the lower courts found that the cumbersome process New York State employs to nominate and elect its state trial judges impermissibly burdens the associational interests of party members. The appellate court concluded that the state regime denied members of political parties "a realistic opportunity to participate in the nominating process." Pet. App. 41-42.

Petitioners contend that New York State may do just that. They argue that a state-mandated nominating process may deny members of political parties any "realistic opportunity" to participate in it so long as a state (1) allows party members access to the general election ballot; and (2) refrains from imposing restrictions on the nomination process that are race-based or similarly invidious. *See* Att'y General of New York Br. 28-30 (AG Br.); New York State Bd. of Elections Br. 17-18, 26-28 (NYSBE Br.); New York County Democratic Committee & New York Republican State Committee Br. 16, 38 (Party Br.). This argument is flawed in several respects.

1. This Court has flatly rejected the contention that access to the general election ballot provides a sufficient remedy for barriers to access at the nomination stage. *See Bullock v. Carter*, 405 U.S. 134, 146-47 (1972). This insufficiency is perhaps most apparent when the nomination

process is dispositive of outcome, as it is here, thereby rendering participation in the general election a mechanical gesture at best. *See id.* at 146 (finding significant "the fact that the primary election may be more crucial than the general election"); *United States v. Classic*, 313 U.S. 299, 318 (1941) (holding that constitutional protections attach "[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice"). But even where the general election remains competitive, this Court has refused to "accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens . . . imposed by state law." *Carter*, 405 U.S. at 146-47; Pet. App. 54-57.

2. The *White Primary Cases* famously established that a state may not exclude or facilitate the exclusion of voters from a party primary based on race. Doing so constitutes invidious discrimination within the meaning of the Fourteenth Amendment, *see Nixon v. Condon,* 286 U.S. 73 (1932); *Nixon v. Herndon,* 273 U.S. 536 (1927), and infringes a participatory interest protected under the Fifteenth Amendment. *See Terry v. Adams,* 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944).

The primaries challenged in *Smith v. Allwright* and *Terry v. Adams* burdened this participatory interest because they excluded African-American voters from the sole locus of meaningful electoral decisionmaking within the jurisdiction. *Smith* and *Terry* both emphasized the decisive character of the challenged primaries, and both posited a participatory interest in access to that juncture. *Smith* highlighted the "right to participate in the *choice* of elected officials" and emphasized the state's inability to nullify this "opportunity for *choice*." *Smith*, 321 U.S. at

664 (emphasis added). In *Terry*, Justice Black observed that black voters were denied "an effective voice" and "strip[ped]" them "of every vestige of influence in selecting [elected] officials." *Terry*, 345 U.S. at 466, 470 (opinion of Black, J.); *see also id.* at 484 (Clark, J., concurring) ("[T]he Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count.").

This Court's precedent makes clear that even racially neutral restrictions burden protected interests if they deny party members "an effective voice" in a political party's nomination process. In *Kusper v. Pontikes*, the Court observed that the challenged state law, which required a voter to register with a party twenty-three months in advance of the primary election to vote in the primary, impermissibly burdened associational interests because it blocked a party's newest members from participating in the party's nomination process. Describing the nomination of candidates as a political party's most "basic function," the Court held that the state-mandated restriction undermined the voter's "prime objective" for joining a party: it denied her "any *voice* in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice." *Pontikes*, 414 U.S. at 58 (emphasis added); *see also Morse v. Republican Party of Virginia*, 517 U.S. 186, 207 (1996) (race-neutral barrier to participation by party members in nomination phase "does not merely curtail their voting power, but abridges their right to vote itself").

These state-imposed burdens are magnified where the nomination process is outcome determinative. *See, e.g.*, *Carter*, 405 U.S. at 146 (1972) (emphasizing that "the primary election may be more crucial than the general

election in certain parts of Texas"); *Classic*, 313 U.S. at 314 (obstacles imposed on the nomination process are "as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance").

The "moment of choosing the party's nominee" is the "'crucial juncture' at which party members traditionally find their collective voice and select their spokesman." *Jones*, 530 U.S. at 575, 586 (quoting *Tashjian*, 479 U.S. at 216); *see also Lubin*, 415 U.S. at 716 (participatory interests impermissibly burdened where qualification for ballot access is "measured solely in dollars"). The associational and participatory interests of party members hinge on access to this juncture.

3. *Cal. Democratic Party v. Jones*, 520 U.S. 567 (2000), does not suggest that members of political parties lack associational and participatory interests "to be included" in their party's nomination process, notwithstanding petitioners' claim to the contrary, *see* NYSBE Br. 21; Party Br. 34. Unlike this case, *Jones* did not involve an alleged divergence between the interests of party members and the interests of party leaders. Indeed, the decision supports recognition of party members' distinct interests.

Jones rejected the contention that California's blanket primary was necessary to prevent the disenfranchisement of voters who were not members of the majority party in safe electoral districts. *See* 530 U.S. at 573 n.5, 583. *Jones* makes clear that the right to vote, as protected by the Constitution, does not entitle voters to state-mandated access to the primary of a party to which they do not belong. *Id.* at 573 n.5 (rejecting contention that "the 'fundamental right' to cast a meaningful vote [was] really at issue in this context").

This limited proposition, however, does not support petitioners' argument that a state-mandated *exclusion* of bona fide party *members* from their party's nomination process burdens no cognizable participatory or associational interest of those members. *Jones* addressed not the participatory interests of party members seeking access to their own party's primary, but instead an interest asserted on behalf of nonmembers claiming an entitlement to access the primary of a party they refused to join. *Jones*' finding that nonmembers are not disenfranchised absent state-mandated access to the party primary says nothing about whether party members might possess distinct associational and participatory interests that entitle them to such access. *Jones*, 530 U.S. 573 n.5 (stating that "the associational 'interest' in selecting the candidate of a group to which one does not belong . . . falls far short of a constitutional right").

But whether or not party members might be so entitled is not even before the Court in the present case. The question presented here is solely whether New York State may require a nominating system that effectively excludes party members from participation. This case does not require the Court to resolve whether a state could compel such access against the wishes of the party's leadership, or whether party members are otherwise entitled to such access when they are excluded by party rule.

Affirming the decision below accordingly does not require the Court to recognize that respondents possess an interest in "untrammeled access," "compulsory access," or "state-enforced access" to a political party's nomination processes, despite petitioners' statements to the contrary. NYSBE Br. 11, 17, 26. It instead requires that the Court

find that *state-imposed obstacles* to the nomination process impermissibly burden respondents' associational and participatory interests.

Jones, in fact, supports the claim that state-imposed obstacles to such participation give rise to distinct harm. In rejecting a proffered justification for the blanket primary, *Jones* suggested that a nonmember "voter who feels himself disenfranchised should simply join the party." 530 U.S. at 584. That suggestion makes little sense if the state remained free to mandate the exclusion of party members from the party's nominating process. *See id.* (distinguishing "a state-imposed restriction" on freedom of association from limitations on association that are privately chosen); *see also Carter*, 405 U.S. at 147 (emphasizing the "burdens . . . imposed by state law").

B. NEW YORK STATE'S NOMINATING PROCESS DENIES PARTY MEMBERS A REALISTIC OPPORTUNITY TO PARTICIPATE IN THE SELECTION OF THEIR PARTY'S CANDIDATES.

The cumbersome regime New York employs to nominate its state trial judges severely burdens the associational and participatory interests of party members. New York State mandates both that voters elect Supreme Court justices, *see* N.Y. Const. art. VI, § 6(c), and that rank-and-file party members select delegates to the nominating conventions at state-run party primary elections. *See* N.Y. Elec. Law §§ 6-106, -124. New York State then conditions access to the primary ballot on hefty signature requirements and geographic restrictions on eligibility that invariably produce but a single, uncontested slate of delegates chosen by the party's leadership. Pet. App. 100. State law mandates that this uncontested slate is "deemed

elected" without appearing on the primary ballot. *See* N.Y. Elec. Law §§ 6-134(4), -136(2)(i), (3), -160(2); Pet. App. 12-13.

State law then requires that a nominating convention follow shortly after the primary at which the nominally elected delegates select judicial nominees. *See* N.Y. Elec. Law §§ 6-124, -126, -158(5). The district court found that no opportunity existed to discuss potential nominees with convention delegates and that the "structural and practical impediments" to such discussions "are insurmountable." Pet. App. 100. That court described the conventions themselves as "perfunctory, superficial events . . . [that] do not determine candidates, but rather formally endorse determinations made elsewhere." Pet. App. 125.

Finally, New York State creates and relies on noncompetitive judicial districts in which judicial candidates ostensibly "run" for election. These districts make clear that the nominating process in practice is not simply an integral part of the procedure of choice, but that it also invariably "effectively controls the choice." *See* Pet. App. 22-23; *United States v. Classic*, 313 U.S. 299, 318, 325 (1941).

Taken together, the components of New York's regime severely burden the associational and participatory interests of party members. Potential office seekers like Respondent Judge Margarita Lopez Torres – bona fide party members who meet the qualifications for judicial office and enjoy considerable public support but are not favored in advance by party leadership – cannot "clear all the hurdles necessary to elect supportive delegates," Pet. App. 100, and confront "insurmountable" obstacles in seeking to lobby the delegates who are selected. *Id.* Party members interested in the nomination of judicial

candidates like Judge Lopez Torres cannot vote for delegates who might support her nomination, given that no such delegates appear on the primary ballot, and the primary election itself is routinely cancelled due to lack of contest. Pet. App. 13, 17, 63.

New York's labyrinthine regime functions like the primary filing fees invalidated by this Court in *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974), in that the regime precludes meaningful participation by potential candidates "no matter how qualified they might be, and no matter how broad or enthusiastic their popular support." *Carter*, 405 U.S. at 143. But while those filing fees limited voter choice in the party primary, *see Lubin*, 415 U.S. at 716 (filing fees meant party members could cast a vote "for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot"), New York's regime typically eliminates choice altogether, by routinely deeming unchallenged delegates "elected" and cancelling the primary election as a matter of course. Pet. App. 12-13.

Without doubt, conduct by individuals acting within this state-mandated regime contributes to the burdens respondents confront. State law does not facially command that the leadership of the political parties run a coordinated slate of convention delegates; it does not compel convention delegates to "rubber stamp" the candidates the party leadership supplies; and it does not expressly foreclose individual party members from securing a place on the primary ballot to become a convention delegate from their assembly districts, even though such standalone candidacies never occur.

But while New York State does not expressly compel all the conduct that contributes to the burden respondents confront, it does more than passively allow problematic practices to occur. Through its statutory regime, New York State actively facilitates the exclusion of candidates not favored by party leaders.

New York State law makes access to the primary ballot contingent on compliance with complex signature and residency requirements that must be satisfied in a relatively short statutory period. *See* N.Y. Elec. Law §§ 6-106, -124; Pet. App. 106-08. State law not only mandates that convention delegates reside within the judicial district at issue, but also requires that each of the component assembly districts, subunits that number between nine and twenty-four for each judicial district, send delegates to the convention. *See* N.Y. Elec. Law §§ 6-106, -124; Pet. App. 106-08. State law makes ballot access contingent on signatures from 500 residents from each assembly district who have not already signed a petition for another qualified candidate, *see* N.Y. Elec. Law § 6-136(2)(i), (3), a requirement that vastly limits the pool of signatories, routinely renders many signatures invalid, and functionally requires that those seeking access to the ballot as a candidate for convention delegate obtain far more than the statutorily mandated 500 signatures to obtain, in fact, the required number of valid ones. Pet. App. 12, 13, 108.

New York State provides for no information on the primary ballot apart from the actual names of the candidates, a practice that requires candidates for delegate (or those who support them) to educate voters through advertisements or personal contacts about the candidate seeking election. Pet. App. 13, 107. Finally, New York State law cedes to the major political parties authority to set the

ultimate number of delegates needed for each assembly district. *See* N.Y. Elec. Law § 6-124.

The district court found that, viewed as a whole, these requirements were "uniquely burdensome" and "virtually guarantee[d]" that the party leadership will "dominat[e]" the selection of convention delegates and alternates. Pet. App. 100. The court found that state law affirmatively "enabled" the major political parties "to make a challenger candidate's effort to elect a majority of delegates more difficult." Pet. App. 106-07. The trial judge accordingly found "unsupportable" the contention that "a candidate for the office of Supreme Court Justice who lacks party leader support can clear all the hurdles necessary to elect supportive delegates to the convention." Pet. App. 100; *see also id.* at 167.

The power exerted in New York State's process by the party leaders is far from happenstance. This power is, instead, the necessary and long demonstrated consequence of the intricate and tortuous nomination process New York State requires. *See generally Williams v. Rhodes*, 393 U.S. 31, 35, 37 (1968) (Douglas, J., concurring) (describing "entangling web of [state] election laws" that required "elaborate political machinery" to satisfy); *Nixon v. Condon*, 286 U.S. 73 (1932) (striking down state law that allowed party executive committee to define membership eligibility after the committee excluded African-American voters from dispositive nomination process).

To be sure, an individual party member might conceivably secure a place on the primary ballot for convention delegate in a single assembly district. But these standalone candidates exist only in petitioners' imagination. *See* NYSBE Br. 9; Party Br. 17, 42; AG Br. 16, 28. No such person ever runs because doing so is an exercise in

futility. Even if this imagined candidate could secure the requisite signatures and successfully earn a spot at the convention, the absence of debate and discussion at this state-mandated convention renders participation a pointless endeavor. As the district court found, convention delegates "do not actually perform deliberative, consultative, informed roles," and that even if they were "amenable to such tasks and attempted to perform them," the period state law mandates for potential deliberation "is so unreasonably brief that it would doom them to failure." Pet App. 116-17; 122; *see also* N.Y. Elec. Law § 6-158(5).

Petitioners appear to concede as much and indeed acknowledge that Judge Lopez Torres must run a slate of delegates if she is to compete meaningfully for her party's nomination. AG Br. 30, 32; NYSBE Br. 32. Petitioners do not dispute the district court's finding that Judge Lopez Torres is structurally disabled from clearing the hurdles to doing so and thus that she cannot do what she must to challenge a "candidate supported by a highly organized and effective political party." NYSBE Br. 32. Petitioners nevertheless call the need to run a slate of delegates a "practical rather than legal" requirement and suggest that this characterization somehow neutralizes the resulting burden. NYSBE Br. 32.

This suggestion ignores the applicable inquiry. Justices on this Court have long called for a "realistic assessment of regulatory burdens on associational rights" and an "examination of the cumulative effects of the State's overall scheme." *Clingman v. Beaver*, 544 U.S. 581, 599 (2005) (O'Connor, J., concurring). This assessment "should focus on the realities of the situation, not on empty formalism." *Id.*, at 610 (Stevens, J., dissenting); *see also Lubin*, 415 U.S. at 719 n.5 (finding write-in

alternative insufficient given "[t]he realities of the electoral process"); *Am. Party of Tex. v. White*, 415 U.S. 767, 783 (1974) (citing *Jenness v. Fortson*, 403 U.S. 431, 439 (1971) (rejecting access that is "merely theoretical")); *Carter*, 405 U.S. at 143 (barriers to candidacy must be examined "in a realistic light" that includes "the extent and nature of their impact on voters"); *Classic*, 313 U.S. at 313, 319 (discussing "the practical operation of the primary law" and noting that its "practical influence . . . may be so great" as to control the ultimate outcome "even though there is no effective legal prohibition upon the rejection at the [general] election of the choice made at the primary").

The reality here is that New York State mandates a cumbersome nominating regime that predictably operates to deny party members a realistic opportunity to participate in the nomination process. This regime provides judicial candidates like Judge Lopez Torres and the party members who wish to support her no meaningful access to the nomination process. *See generally Carter*, 405 U.S. at 143 ("the rights of voters and the rights of candidates do not lend themselves to neat separation"); *Lubin*, 415 U.S. at 716 ("voters can assert their preferences only through candidates"). Instead, the State invites rank and file members of political parties to participate in a state-mandated primary, and then imposes a host of structural obstacles that effectively rescind the invitation and render participation a charade. Compounding the harm is the fact that the state-created nomination process routinely dictates the ultimate victor. The result is a regime that severely burdens respondents' associational and participatory interests.

New York State might have avoided this burden by imposing a direct primary that eliminated the convention as a component of the nomination process, but it is not the absence of a direct primary that renders the challenged system burdensome. Political parties have long relied on political conventions to nominate candidates, and this Court has made clear that states may require that political parties nominate their candidates through such conventions. *See Am. Party of Tex.*, 415 U.S. at 781 (holding that a state "may insist that intraparty competition be settled before the general election . . . by party convention"). Contrary to petitioners' claims, AG Br. 18-27, 29; Party Br. 7-12, 20-23; NYSBE Br. 15, 25, affirming the decisions below would not call this longstanding practice into question.

New York State's nomination process is burdensome not because it dispenses with a direct primary or because it relies on a political convention as a component of the process. Instead, the burden arises from the combined operation of critical components of New York's intricate nominating regime. These include the signature and residency requirements, the need to educate voters about delegate propensities outside the ballot itself, the large number of delegates required (as dictated by the parties exercising power ceded by the State), the short period between the primary and the convention, and the absence of competition in the general election.

New York State need not have structured its nomination process in this manner. The State, however, opted to create a hybrid system, and specifically invited party members to participate in the nomination process through a state-mandated indirect primary. But rather than implement this system with subsidiary rules that

facilitated meaningful participation, the State imposed barriers that rendered such participation impossible. *See Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) ("If the State chooses to tap the energy and legitimizing power of the democratic process, it must accord the participants in that process the First Amendment rights that attach to their roles.").

Judge Lopez Torres, of course, holds no entitlement to her party's nomination. Nor are any individual party members assured that their party will nominate the judicial candidates they prefer. New York's failure to guarantee either result certainly does not give rise to a legally cognizable burden. But while respondents are not entitled to victory, they are entitled to a process in which the State has not simultaneously invited their participation and ensured their participation will be meaningless. When a state chooses to structure in meticulous detail how a political party selects judicial candidates, and specifically provides that party members will have a vote in that process, the state impermissibly burdens the associational and participatory interests of those members when the resulting process entirely denies them any prospect of meaningful participation. As the district court aptly stated, "[a]n election must always retain the essential qualities of an election." Pet. App. 165.

C. NEW YORK STATE'S NOMINATING REGIME ADVANCES NO LEGITIMATE OR COMPELLING STATE INTEREST.

Because New York State's nomination process severely burdens the associational and participatory interests of party members, the regime's validity rests on whether it is necessary to advance a compelling state interest. *See, e.g.*,

American Party of Texas v. White, 415 U.S. 767, 780 (1974) (validity of restrictions on nomination "depends upon whether they are necessary to further compelling state interests") (citing *Storer v. Brown*, 415 U.S. 724, 729-33 (1974)); *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) ("a significant encroachment upon associational freedom cannot be justified by a mere showing of a legitimate state interest"); *Bullock v. Carter*, 405 U.S. 134, 144 (1972) (applying "close scrutiny" to filing fee requirement). New York State's nomination process not only fails under this "close scrutiny," but is also deficient under less rigorous review because it lacks a sufficient connection to any legitimate state interest.

Petitioners claim that the challenged regime advances the associational interests of political parties, enhances judicial independence and confidence in the judiciary, and promotes diversity in the judiciary. AG Br. 25-27; NYSBE Br. 6-7; Party Br. 37-41, 44-47. These are all worthy goals. The problem lies not with them, but in the categorical failure of the State's regime to advance any of them. In fact, the regime operates affirmatively to undermine the first two proffered goals, and is only tenuously related to the third.

1. This Court has never suggested that political parties' leaders possess an associational interest in excluding the party's rank and file from critical junctures in the nominating process. If anything, precedent suggests just the opposite.

This Court has "considered it 'too plain for argument' . . . that a State may require parties to use the primary format for selecting their nominees, in order to assure that intra-party competition is resolved in a democratic fashion." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572

(2000) (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974)). The Court's recognition of state power to mandate participation by a party's rank and file membership in the candidate selection process necessarily assumes the state may exercise this power without infringing any cognizable associational interest of the party itself. *See Jones,* 530 U.S. at 572; *see also Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 237 (1986) (Scalia, J., dissenting) (arguing that states "may lawfully require that significant elements of the democratic election process be democratic – whether the Party wants that or not."); *Ripon Society, Inc. v. National Republican Party,* 525 F.2d 567, 584 n.57 (D.C. Cir. 1975) (*en banc*) (noting as an example of American exceptionalism "the degree to which the selection of party candidates is entrusted even to the party rank and file").

The Court, moreover, has long recognized that the Constitution limits state interference with party members' freedom of association. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."). Indeed, while repeatedly recognizing the critical importance of the nomination process to the associational freedom of a political party, the Court has emphasized and celebrated the role of party members in that process. *Cal. Democratic Party v. Jones*, for instance, emphasized that party members have an associational interest in selecting candidates absent the influence of nonparty members, and explicitly noted that "[t]he ability of the party leadership to endorse a candidate is simply no substitute for the party *members'* ability to choose their own nominee." 530 U.S. at 580 (emphasis added); *see also Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 230-31 (1989) (emphasizing as

particularly strong "the associational rights at stake" when "party *members* . . . seek to associate . . . with one another in freely choosing their party leaders.") (emphasis added); *Tashjian*, 479 U.S. at 236 (Scalia, J., dissenting) (noting state power to protect "the general party membership against . . . minority control," suggesting a preference for party decisionmaking "by democratic ballot" to party convention, and equating "the Party" with what "a majority of the Party's members . . . favor" and with "the views of the Party's rank and file").

Petitioners' insistence that party leaders possess an associational interest in excluding party members from the nomination process also renders nonsensical a widely-noted passage from *Jones*. NYSBE Br. 26-28, Party Br. 37-41. The Court in *Jones* suggested that non-party members might remedy any perceived injury from their exclusion from determinative party primaries by "simply join[ing] the party." 530 U.S. at 585. Just as this proposal suggests an absence of state power to mandate the exclusion of such new members from the nomination process, *see supra*, it also implies that party leaders must lack authority to require such exclusions. The existence of the power to do so, whether exercised by the State or the party's leadership, renders the Court's proposal in *Jones* a meaningless endeavor.

2. Even if political parties possessed an associational interest in excluding their members from the nomination process, New York State's nominating regime does not promote that interest.

Precedent makes clear that political parties possess significant associational interests in structuring party affairs free from state interference. This Court has struck down numerous state laws that it concluded intruded too

deeply into party autonomy. *See, e.g.*, *Jones*, 530 U.S. at 567 (invalidating state law mandating a blanket primary as illegal intrusion on party autonomy to choose standard bearer); *Tashjian*, 479 U.S. at 208 (invalidating state law that blocked party from including independent voters in party primary); *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 126 (1981) (upholding party autonomy to adopt and enforce rules governing national conventions that disregard state laws restricting the election of convention delegates); *Cousins v. Wigoda*, 419 U.S. 477 (1975) (same). *See also Eu*, 489 U.S. at 216 (invalidating state law that prohibited parties from endorsing candidates in primary and that "dictate[d]" the party's structure and composition). In each of these cases, the Court found that the State interfered with a party's power to organize itself by seeking to structure party decisionmaking in a manner the party itself opposed.

In the present case, petitioners do not complain that a state law has impermissibly burdened their associational interests by intruding on their power to structure party decisionmaking. They instead seek preservation of a state-mandated nominating process that they insist promotes the party's associational freedom. New York State's nominating regime, however, does no such thing.

New York's regime concentrates power in the party's leadership and thereby structures party decisionmaking in a manner petitioners desire. That state law dictates a decisionmaking structure that the leadership of a political party might select for itself does not mean that the New York's regime promotes the party's associational interests. Petitioners' insistence that it does fails to distinguish the policy from its source. They focus shortsightedly on the benefits they perceive themselves to enjoy under the

challenged regime, Party Br. 37-38, and in the process fail to recognize the gross intrusion on party autonomy New York State's nominating process represents. By restricting participation by the party rank and file in the nomination process, New York State's regime appropriates to the State the freedom of political party members to determine party structure and leadership free from state interference. This intrusion exists even if, in a completely unregulated regime, the party itself might have chosen to structure party decisionmaking in the same manner mandated by New York State. *See Eu*, 489 U.S. at 225 n.15 (emphasizing that "the parties' alleged consent ignores the independent First Amendment rights of the parties' members").

The distinction between state law and party preference critically informs precedent from this Court and from several lower courts, but is wholly ignored by petitioners. AG Br. 30-31; NYSBE Br. 27-28; Party Br. 37-41. This Court, for instance, has held that a state impermissibly burdens the associational interests of a political party when it compels the inclusion of nonmembers in the party primary, *see Jones*, 520 U.S. at 567, even though the party itself may invite nonmembers to participate in its nominating process. *See Tashjian*, 479 U.S. at 208. The Court has also held that states may not compel political parties to seat delegates at their party conventions where those delegates were selected in accordance with state-mandated processes that the party rejects. *See Wisconsin ex rel. LaFollette*, 450 U.S. at 107; *Wigoda*, 419 U.S. at 477. Requiring the inclusion of such delegates burdens the associational interests of political parties even though the parties might select those very procedures for themselves. *Compare Tashjian*, 479 U.S. at 216-17 (upholding associational freedom of political party to include nonmembers in

nominating process) *with Wisconsin ex rel. LaFollette*, 450 U.S. at 124 (associational freedom of political party includes power to reject delegates selected at state primary at which nonmembers participated).

Lower courts have likewise recognized this distinction between party power and state rule by upholding the ability of political parties to structure participation in party affairs in a manner not available to a state. *See, e.g., Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) (associational freedom encompasses party power to mandate that men and women comprise equal proportions of state delegation to national convention); *Ripon*, 525 F.2d at 585 (political party may choose "among various ways of governing itself . . . the one which seems best calculated to strengthen the party and advance its interests," even if that choice allocates delegates in manner that dilutes the voting strength of some members); *see also LaRouche v. Fowler*, 152 F.3d 974, 996-98 (D.C. Cir. 1998) (associational freedom of political party includes power to exclude candidate as unqualified under party rules and disregard votes cast for him).

Longstanding recognition of the principle that political parties possess associational interests in structuring their affairs for themselves does not support recognition of state power to dictate those structures. Whatever autonomy parties possess, a state does not have the power to entrench candidates favored by party leaders to the detriment of party members. The exercise of such state power necessarily undermines that associational freedom.

3. Even if petitioners possessed the associational freedom they claim to exclude their members from the nomination process, and even if that interest could be advanced by a state regime that dictates rather than

allows this result, New York State's nomination process, which facially allows for rank and file participation but in reality precludes such participation, advances that interest only by obfuscation.

New York State invites participation by the party rank and file in the nomination process, but this invitation is not a genuine one. State law provides for the election of delegates to the party convention at a state-run primary in which party members may vote, but then imposes a series of requirements that ensure this opportunity for participation will be meaningless.

If New York State wants to promote the power of the party leadership within the nomination process, numerous avenues are available. The State might eliminate the election of judges entirely and adopt an appointive system in which state officials look to party leaders for recommendations about which candidates to appoint. Alternatively, New York State might continue to allow for the election of state trial judges while providing by explicit legislation that party leaders nominate the candidates for State Supreme Court Justice. The State might require a pure convention system where the party itself would design the rules for participation and presumably party leaders would play a decisive role. Or the State might deregulate the nomination process entirely, and leave to the party the power to select the structure for the nomination of candidates.

Any of these regimes would lodge decisionmaking power in the party leadership more directly and transparently than the system invalidated below, a system that facially invites participation by the party rank and file but which functionally excludes party members from participation. This Court has emphasized the need for such

transparency in a variety of contexts, making clear that the process selected to achieve a legitimate government policy must not conceal or obscure the source and content of the policy. *See generally Smith v. Doe*, 538 U.S. 84, 99 (2003) ("Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused."); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 787 (1982) (discussing measures that "blur[] the lines of political accountability").

4. This lack of transparency also explains why New York State's nominating regime is insufficiently linked to the State's interest in promoting judicial integrity, confidence in the judiciary, and diversity among trial judges.

Judicial integrity and confidence in the judiciary might be fostered by insulating judicial candidates from direct voter involvement in their selection. New York State's hybrid system, however, limits such involvement not by explicit statutory command but instead by a misleading regime that facially invites voter participation but functionally lodges critical decisionmaking power in local party leaders. New York State may prefer appointment to election as a means to select judges, but "transform[ing] a de jure election into a de facto appointment" is not a permissible means to secure that end. Pet. App. 70.

In fact, New York State's regime actively thwarts the very good government practices petitioners claim the system promotes. The district court noted "[t]he record of financial contributions by candidates for Supreme Court Justice" to local political leaders, Pet. App. 136, a practice that suggests the State's regime produces not independently-minded judges, but instead ones who owe fealty to the party leadership. This state-mandated return to the "smoke-filled room" accordingly frustrates interests in

judicial integrity and confidence in the judiciary. *See* Pet. App. 149 n.36.

So too with diversity. Even assuming that a nominating process lacking direct voter involvement best fosters diversity – an assumption contradicted by experience, *see* Pet. App. 74 ("over the course of 85 years the nominating process has, to put it mildly, failed to fully effectuate the state's goals as to geographic and racial diversity") – a process that invites such voter involvement but renders that involvement a sham is an impermissible path to the desired goal.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,
Petitioners,

v.

MARGARITA LOPEZ TORRES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. NEW YORK'S SCHEME FOR NOMINATING CANDIDATES IN SUPREME COURT ELECTIONS UNDERMINES THE TWIN GOALS OF JUDICIAL INDEPENDENCE AND ACCOUNTABILITY 4

A. New York's Scheme Makes Supreme Court Justices Unaccountable to Voters 7

B. New York's State-Mandated Nominating System Also Undermines the Goal of Judicial Independence 10

II. BECAUSE NEW YORK'S JUDICIAL NOMINATING CONVENTION IS UNIQUE, THE *LOPEZ TORRES* DECISION DOES NOT IMPLICATE OTHER STATE ELECTORAL STATUTES. 14

A. The New York Judicial Nominating Convention Is a Distinctive Statutory Scheme That, in Fact, Severely Burdens First Amendment Rights 14

B. The State Election Laws Cited by Petitioners Are Distinguishable from the Challenged New York Statute, and Thus Will Not Be Affected by the *Lopez Torres* Decision 16

i. Most State Statutes Do Not Mandate the Nomination of Candidates for Public Office by Convention 17

ii. Six States Mandate Nominating Conventions Only in Narrow Circumstances 19

iii. Four States Require Conventions to Nominate Candidates for Certain Public Offices, but Grant Political Parties Broad Discretion to Structure the Process 21

III. THE SECOND CIRCUIT'S DECISION IS NOT A BLANKET BAN ON THE USE OF PARTY CONVENTIONS TO MAKE CANDIDATE NOMINATIONS. 24

IV. PETITIONERS' CONCERNS REGARDING POTENTIAL INCONSISTENCIES BETWEEN THE HOLDING IN *LOPEZ TORRES* AND THE PRESIDENTIAL NOMINATING SYSTEM ARE MISPLACED. 25

A. The Presidential Nominating System Is Not a Meaningful Point of Comparison. 26

B. Compared to the New York System, the Presidential Nominating Convention Is More Open to Party Member Participation, and More Conducive to Associational Activity 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Bachur v. Democratic National Party, 836 F.2d 837 (4th Cir. 1987) 27

Bridges v. California, 314 U.S. 252 (1941) 5

Cousins v. Wigoda, 419 U.S. 477 (1975) 26, 27

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Lopez Torres, et al. v. New York State Bd. of Elections, et al., Pet. App. 1-92 ..... *passim*

Lopez Torres, et al. v. New York State Bd. of Elections, et al., Pet. App. 93-185 2

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 2

United States v. Classic, 313 U.S. 299 (1941) 2, 19

United States Constitution:

Art. II, § 2 5

Art. II, § 4 5

Art. III, § 1 5

First Amendment ..... *passim*

Fourteenth Amendment 1

State Constitutions:

MICH. COMP. LAWS CONST. art. 5, § 21 23

State Laws:

ALA. CODE
§ 17-13-2 17
§ 17-13-50 17

ARIZ. REV. STAT. § 16-342 17

ARK. CODE ANN. § 7-7-104 17

COLO. REV. STAT.
§ 1-4-102 18
§ 1-4-103 18

CONN. GEN. STAT.
§ 9-382 18
§ 9-415 18

DEL. CODE. ANN. tit. 15, § 3113 18

FLA. STAT. ANN. § 99.0965 (repealed) 18

GA. CODE ANN.
§ 21-2-180 17
§ 21-2-2(23) 17

IDAHO CODE § 34-707 18

10 ILL. COMP. STAT. 5/7-9 18

IOWA CODE ANN.
§ 43.107 21
§ 43.123 21

IND. CODE ANN.
§ 3-8-4-2 22
§ 3-8-4-3 to -5 22
§ 3-10-1-4(b)(2) 22

KAN. STAT. ANN. § 25-202(b) 19

KY. REV. STAT. ANN. § 118.325 17

ME. REV. STAT. ANN. tit. 21-A, § 321 18

MICH. COMP. LAWS ANN.
§ 168.72 23
§ 168.620a 23
§ 168.595 23
§ 168.598 23

MD. CODE. ANN.
§ 5-701 17
§ 5-703.1 17

N.H. REV. STAT. ANN. § 667:21 19

N.M. STAT. ANN.
§ 1-8-1 ..... 17, 19
§ 1-8-2 17

NEB. REV. STAT. § 32-721 20

N.C. GEN. STAT. ANN. § 163-98 19

N.D. CENT. CODE § 16.1-13-14 20

N.Y. ELEC. LAW
§ 6-106 ..... 15, 16
§ 6-124 ..... 15, 16
§ 6-134(4) 16
§ 6-136 ..... 15, 16
§ 6-158 15

§ 8-100(1) 15

OHIO REV. CODE ANN. § 3513.11 18

OR. REV. STAT. § 248.009 17

R.I. GEN. LAWS § 17-12-13 18

S.C. CODE ANN.
§ 7-9-70 ..... 19, 17
§ 7-11-10 17
§ 7-11-30 17

S.D. COD. LAWS
§§ 12-5-1 to -22 22

TENN. CODE ANN.
§ 2-13-202 17
§ 2-13-203 17

TEX. ELEC. CODE ANN.
§ 172.001 19
§ 181.003 19

UTAH CODE ANN. § 20A-9-404 17

VA. CODE ANN.
§ 24.2-508 ..... 17, 18
§ 24.2-509 ..... 17, 18

WASH. REV. CODE § 29A.20.121 18

W. VA. CODE § 3-5-22 18

WYO. STAT. ANN.
§ 22-4-303 19
§ 22-4-406 19

Political Party Rules:

Ind. Repub. Party Rule 220 22

Ind. Repub. Party Rules 186, 187 22

Ind. Dem. Party Rule 17(a)(7) 22

Mich. Dem. Party Rules, Art. 4B 23

Republican Nat'l Comm. Rules 13, 14, 15 26

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S. Dak. Dem. Const., Art. IX, §§ 2, 4 22

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Nicholas P. Lovrich & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 Just. Sys. J. 23 (1984) 9

NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, 2000, S. DOC. NO. 106-16 (2000) 29, 30

2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLIED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS (Boston 1853) 6

Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L. Rev. 31 (1986) 6

ROBERT E. DICLERICO & JAMES W. DAVIS, CHOOSING OUR CHOICES: DEBATING THE PRESIDENTIAL NOMINATING PROCESS (2002) 30

Roy A. Schotland, *To The Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 Willamette L. Rev. 1397 (2003) 6

2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850 (Indianapolis 1850) 7

Theodore Shabad, *Soviet to Begin Multi-Candidate Election Experiment in June*, N.Y. Times, Apr. 15, 1987 at A6 8

STATEMENT OF INTEREST[1]

This *amici curiae* brief in support of Respondents is filed on behalf of political scientists Thomas Mann and Norman Ornstein, and the Reform Institute and the Campaign Legal Center, both nonprofit, nonpartisan organizations.

These *amici* have for many years studied campaign finance and voting rights issues arising in judicial, legislative, and executive branch elections on the state and federal level. Descriptions of the *amici* are included in Appendix A to this brief.

The present case concerns a challenge brought under the First and Fourteenth Amendments of the Constitution to certain provisions of New York Election Law governing New York's convention system for nominating candidates for the office of Justice of the New York State Supreme Court. The case raises important questions about the normative goals of the judicial selection process, the authority of the state to regulate the activities of political parties, and the scope of First Amendment protection for party members' participation in party nominations. *Amici* have a longstanding, demonstrated interest in the integrity of elections and the protection of citizens' right to vote and to participate in the political process, and these interests are directly impacted in this litigation.

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of the State of New York, have filed letters with the Court consenting to all *amicus* briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Because New York has "cho[sen] to tap the energy and legitimatizing power of the democratic process" by requiring the election of its state trial court justices, it must "accord the participants in that process the First Amendment rights that attach to their roles." *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). This principle holds as much for the nomination stage – an "integral part of the election machinery" – as it does for the general election that follows. *United States v. Classic*, 313 U.S. 299, 318 (1941). New York voters are thus entitled to the meaningful exercise of their First Amendment rights as much in the nomination of judicial candidates as in their eventual election.

New York's statutory scheme of judicial nominating conventions makes a mockery of this constitutional principle. As documented in exhaustive detail by the courts below, these conventions are simply a "rubber stamp" for the preferences of party bosses. The New York convention scheme fences out any candidate lacking the support of party leadership, divests rank-and-file party members of their voting and associational rights, and thereby "arrogates to [party leaders] a choice that belongs to the people." Pet. App. 5.[2]

New York's unique primary scheme also undermines the twin aims of any legitimate judicial selection process: maintaining judicial accountability and independence. Although the primary scheme allows party voters to cast a vote, that vote can only ratify the choices of local party leaders. Since party leaders, not the rank-and-file, effectively choose the party candidates and thus usually the winner in the subsequent general election, would-be Supreme Court Justices will follow the interests of party bosses, not party members. Likewise, although New York's primary scheme

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[2] "Pet. App. __" refers to the opinions of the Second Circuit (Pet. App. 1-92) and district court (Pet. App. 93-185) in the Petition Appendix.

may ensure that Supreme Court Justices are independent of public opinion, it makes them completely dependent on local party leaders, a group that represents neither the party voters nor the general citizenry. As a result, Supreme Court judgeships and many below them in the New York judicial hierarchy have become objects of local party patronage, where party bosses not only control who becomes a judge but also feel free to demand whom judges hire in their most important and sensitive positions.

In light of the constitutional burdens imposed by the New York statute at issue here – and its diminishment of the judiciary's accountability and independence – *amici* concur with the Second Circuit that strict scrutiny should apply to its review. As expressed by the Second Circuit, the First Amendment affords voters and candidates a "realistic opportunity to participate in the nominating process," free from "burdens that are both severe and unnecessary to further a compelling state interest." Pet. App. 44.

Although providing the party rank-and-file with the mere "opportunity to participate" in their own party's nomination process would seem basic to their First Amendment right to associate, Petitioners herein assert that the Second Circuit decision pronounces a "broad and novel" constitutional standard. Reply to Brief in Opposition to Petition ("Cert. Reply") at 2. Petitioners further claim that the "unprecedented" decision spells the end for 34 state statutes which provide for some variety of nominating convention, as well as for the presidential nominating convention. *See* Brief for Petitioners New York County Democratic Committee, *et al.* ("Petitioners' Br.") at 11-12; Brief for Petitioner Attorney General of the State of New York ("NY-AG Br.") at 23-24.

This is hyperbole, and should be rejected as such. *Amici* respectfully submit this brief to refute Petitioners' contention that the decision below "pose[s] a threat to the process by

which political parties select their candidates nationwide and to basic principles of representative democracy." Petition for Writ of Certiorari ("Cert. Pet.") at 3. The Second Circuit decision does not implicate the 34 state convention statutes cited by Petitioners for the simple reason that the New York system is unique, and has no parallel in another state or jurisdiction. Indeed, given how New York's judicial nominating system undercuts the accountability and independence of its Supreme Court judiciary, it is not surprising that the New York system has been adopted by no other state. Similarly, the *Lopez Torres* case has no bearing on the presidential nominating convention, which, unlike the New York statutory system, is national in scope and effect, based predominantly on party rule, and more accessible and open to voter participation.

In sum, reports of the convention system's death are greatly exaggerated. The Second Circuit's decision is a limited, fact-bound ruling and will have no repercussions for the electoral systems of the many states, for the presidential nomination process, or for the use of conventions generally. Its only effect will be on New York itself: by restoring to the voters some measure of their right to associate freely with their party of choice; and by releasing the Supreme Court judiciary from the vise grip of political party leadership.

ARGUMENT

I. NEW YORK'S SCHEME FOR NOMINATING CANDIDATES IN SUPREME COURT ELECTIONS UNDERMINES THE TWIN GOALS OF JUDICIAL INDEPENDENCE AND ACCOUNTABILITY.

American judicial selection processes serve two complementary aims: judicial independence and accountability. The federal system, for example, pursues largely the first. Neither the President, Congress, nor the

people themselves can dismiss a judge for an unpopular decision or even reduce that judge's salary. U.S. Const. art. III, § 1. But judicial independence is not absolute. The Senate must confirm judges the President nominates, U.S. Const. art. II, § 2, cl. 2; anyone may criticize a judge, *Konigsberg v. State Bar*, 353 U.S. 252, 269 (1957) ("Citizens have a right under our constitutional system to criticize government officials and agencies. Courts are not, and should not be, immune to such criticism."); *Bridges v. California*, 314 U.S. 252, 270 (1941) (same); and the Senate can remove a judge through impeachment for "high Crimes and Misdemeanors," U.S. Const. art. II, § 4. Thus, although federal judges enjoy a high degree of job protection, which insulates their decisionmaking from influence by political actors and public opinion, even they must abide some limits and are accountable through reputation and criticism to the citizenry.

Some state systems, on the other hand, pursue largely the second aim. They elect their judges and subject them to regular reelection. *See* American Judicature Society, *Judicial Selection In The States, Appellate and General Jurisdiction Courts, Initial Selection, Retention, and Term Length*, Jan. 2004 [hereinafter *AJS Data*] (listing Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Washington, West Virginia, and Wisconsin as examples).[3] In these systems, since the judge's job depends on the favor of the public, the judge can be counted on to exercise judicial power with the public's view somewhere in mind. Like the federal system, however, these state systems do not pursue their primary goal single-mindedly. Although these judges must face election, they usually have to do so less often than do legislative and executive officers. *See* Roy A. Schotland,

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[3] Available at http://www.ajs.org/js/SelectionRetentionTerms.pdf (last visited July 5, 2007).

To The Endangered Species List, Add: Nonpartisan Judicial Elections, 39 Willamette L. Rev. 1397, 1400 & n.17 (2003); Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L. Rev. 31, 51 (1986). And, once elected, they often face a unique type of reelection process, the retention election, which insulates them somewhat from popular opinion. *See* David B. Rottman & Roy A. Schotland, *What Makes Judicial Elections Unique?*, 34 Loy. L.A. L. Rev. 1369, 1371 (2001) (arguing that although a retention election provides "electoral accountability for . . . judges, it seeks to balance that accountability with protection for judicial independence"). Other state systems fall somewhere in between these primarily appointive or elective systems. They may provide for initial appointment of their judges subject to occasional retention elections, *see AJS Data* (listing Alaska, Colorado, Iowa, Nebraska, Utah, and Wyoming as examples), or provide for the appointment of some judges and the election of others, *see id.* (listing California, Florida, Indiana, Missouri, New York, Oklahoma, South Dakota, and Tennessee as examples).

Although different systems pursue the goals of independence and accountability in different ways and to different degrees, nearly all respect the importance of each. As Rodney French argued in the Massachusetts constitutional convention considering judicial elections: "I like to have independent and upright men in all public stations, but I do not like the idea of having any public officers entirely independent of the people. I think they should be so dependent at least, as to have an eye to the power they serve." 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLIED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 785 (Boston 1853). Similarly, Henry Thornton, a delegate to the Indiana Constitutional Convention of 1850, expressed the same need

to pursue both goals: "I do not say that [the judge] should be so much under [the people's] influence as to be awed into decisions, but merely that he should understand their will." 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850, at 1662 (Indianapolis 1850). Judges must possess independence if only to ensure that the other branches of government encroach neither on one another nor on the people and must remain accountable to some degree lest they themselves reach beyond their proper sphere.

Amici do not argue here that one particular type of judicial selection system best combines independence and accountability. Reasonable people may accommodate these goals differently and different systems may be better suited to different political cultures. *Amici* do believe, however, that New York's unique system for selecting state Supreme Court Justices turns both these objectives on their head. Instead of accommodating accountability and independence in some way, as other systems do, it paradoxically undermines both goals at the same time. By design, it denies voters any real power to hold judges accountable *and* denies judges independence from political actors. By effectively lodging the power to control the nomination of state Supreme Court Justices in local political party leaders, New York's mandated system makes state Supreme Court Justices—and many below them on the judicial ladder—beholden to local party officials. The judges, their law clerks, and other judicial employees become mere patronage spoils.

A. New York's Scheme Makes Supreme Court Justices Unaccountable to Voters.

New York's state-mandated primary system undermines judicial accountability in several mutually reinforcing ways. First, it denies the public any way to replace judges who consistently mistake the judgments of the people's

representatives or otherwise fail to respect the law and the values it embodies. Under the New York system, local party officials enjoy unfettered power to choose and control the slates of convention delegates who later nominate the party's Supreme Court candidates. As the district court and court of appeals found, others, particularly party rank-and-file voters, have no real power to nominate delegates or to persuade those delegates chosen by local leaders to go against the local leaders' wishes. Pet. App. 31-32, 45-46. Under these conditions, an aspiring judge will curry the favor of local party bosses and be unconcerned about what the voters themselves think. So long as the aspirant enjoys the bosses' support, he will face no primary opposition and thus need not fear the voters' judgment. No matter how much voters loathe him, he knows he will be nominated since local party leaders will ensure he has no intraparty competition. The most voters can do to register unhappiness with the judge's past actions is stay home. But so long as the judge votes for himself he will win. As in the former Soviet Union, where voters had a "choice" of a single candidate picked by the ruling Communist Party, *see* Theodore Shabad, *Soviet to Begin Multi-Candidate Election Experiment in June*, N.Y. Times, Apr. 15, 1987, at A6, voters in New York's Supreme Court primary enjoy all of democracy's ceremonies without any of its substance.

Second, without intraparty competition, judges have no political incentive to internalize the values of the voters they serve. A judge who fears that others might run against her in the future will feel some need to consult, if not follow, the voters' values. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs For Office?*, 48 Am. J. Pol. Sci. 247 (2004) (offering empirical evidence that elected judges' values in sentencing align more closely to the public's as they approach reelection). If the election is a mere formality, on the other hand, she will not. She will instead feel the need not to

offend those who have real power over her future ballot prospects: the local party leaders. She will curry favor with them, not with the people; internalize, to some degree, their way of thinking, not the public's; and respond to their wishes, not her constituents'. The New York election system perverts the values that led to its adoption by making Supreme Court Justices accountable to their party patrons, not to the public.

Third, a system, like New York's, that denies voters any real say deadens voter interest and attention in Supreme Court elections and undercuts any legitimacy the election could confer on the judiciary. As social scientists have noted, the more competitive an election, including a judicial election, the more people interest themselves in it, follow its turns and arguments, and vote. L. MILBRATH, POLITICAL PARTICIPATION: HOW AND WHY PEOPLE GET INVOLVED IN POLITICS 101-02 (1965); Kenneth N. Griffin & Michael J. Horan, *Merit Retention Elections: What Influences the Voters?*, 63 Judicature 78, 85-86 (1979); Nicholas P. Lovrich & Charles H. Sheldon, *Voters in Contested, Nonpartisan Judicial Elections: A Responsible Electorate or a Problematic Public?*, 36 W. Pol. Q. 241, 247-48 (1983); Nicholas P. Lovrich & Charles H. Sheldon, *Voters in Judicial Elections: An Attentive Public or an Uninformed Electorate?*, 9 Just. Sys. J. 23, 32-35 (1984); Charles H. Sheldon & Nicholas P. Lovrich, *Knowledge and Judicial Voting: The Oregon and Washington Experience*, 67 Judicature 235, 238-39 (1983). The more engaged and informed the electorate, the more accountable the candidates and the more people will believe that their judges reflect them in important ways. The judges will enjoy a greater trust, their decisions will command more respect, and they will earn for the courts the legitimacy on which the law depends. If people feel, however, that their vote can at most ratify a local party boss's choice of judge, they are likely to see the judiciary as unaccountable, unqualified, and untrustworthy and eventually come to view its decisions as illegitimate.

In New York, moreover, interparty competition in the general election cannot overcome this accountability deficit. For one thing, as the Second Circuit recognized, "because one-party rule is the norm in most judicial districts, the general election is little more than ceremony." Pet. App. 23. From 1990 through 2002, about half of New York's elections for Supreme Court Justice were entirely uncontested. *Id.* Only one party's candidate—nominated through a process that marginalized the party's own rank-and-file voters—appeared on the ballot. In judicial districts dominated by a single party, in fact, interparty competition was virtually non-existent through this whole period. During this time, 91 percent of Supreme Court elections in the Sixth Judicial District (Republican) were unopposed; in the First (Democratic), 85 percent were. *Id.* And, as the district court noted, "[i]n districts that are not dominated by a single party, the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." *Id.* at 130 & n. 26. Rather than compete for these judicial offices, which would provide some voter choice, the two major parties prefer to split the rights to designate individual judges and so divide the resulting patronage spoils. Many, if not most, of the remaining elections were similarly "ceremon[ial]." *Id.* at 23. Although they were nominally contested, they were not competitive. *Id.* at 130-31. Using a standard yardstick from political science, only two percent of Supreme Court general elections in New York City during this period could be said to be competitive at all. *Id.* at 130.

B. New York's State-Mandated Nominating System Also Undermines the Goal of Judicial Independence.

By allowing local party leaders to handpick and control the delegates who choose the party's Supreme Court nominees, New York's nomination process makes judicial

candidates beholden to those leaders. As Petitioners' own expert witness, New York City Board of Elections Commissioner Douglas Kellner, testified, the New York system is "designed" to suppress all candidacies other than those approved by party leaders. Despite the fact that the primary process advertises itself as open, nominally permits would-be candidates to run slates of delegates, allows party members to vote for delegates, and has those delegates choose the party's nominee, "the idea that an individual candidate would go out and recruit delegate candidates and run delegates pledged to that candidate in the primary is not the system and it twists the *design* of the system on its head." *Id.* at 17 (emphasis added). "By definition," Kellner added, "the convention system is *designed* [so] that the political leadership of the party is going to designate the party's candidates. Specifically, judicial delegates are part of the party leadership and responsive to it and make it up, you know, constitute the party leadership." *Id.* at 19 (emphasis added). New York has not merely implemented a nomination system that has the unavoidable effect of lodging control over Supreme Court candidates in local party bosses; it has designed one for that very purpose. Because the district leaders, who chose the convention delegates, are so closely affiliated with the county party chairs, the county chairs can effectively dictate whom the convention picks. As Henry Berger, the former Chairman of New York's Commission on Judicial Conduct as well as a former district leader and judicial delegate, put it, "In my experience, the district leaders almost always follow the wishes of the county party chairperson when it comes to voting for Supreme Court candidates at the convention. In turn, the delegates follow the wishes of the district leaders who have selected them and support the county chairperson's chosen candidates." *Id.* Although the New York scheme relies on the informal network of relationships that defines the local party hierarchy, that network works so effectively that Berger testified that in the Second and Twelfth Judicial Districts party officials had

told him the names of the party's Supreme Court nominees not only before the conventions had met, but even before the primary elections had taken place at which the voters would choose the delegates to send to those conventions. *Id.* The primary election, like the convention itself, is a ceremonial step to wrap the choice of local party leaders in the mantle of democratic legitimacy.

So much control does the nomination process give them over the overall election that local party leaders view judgeships as their dependencies and reliable sources of patronage. Judge Lopez Torres's experience serves as an illustration. Backed by the Kings County Democratic Committee, Lopez Torres was elected a Brooklyn Civil Court judge in 1997. Soon thereafter, the county party leader and the district party leader directed her to hire a particular person as her law clerk. She interviewed the man and contacted his former employer, a Brooklyn Supreme Court Justice, who described the man's work as "mediocre" and said that "he had spent an enormous amount of time on the phone doing political work." *Id.* at 24-25. Lopez Torres then hired someone else to help her research and draft her opinions.

Both the county and the district leader confronted her. The county leader demanded that she fire the person she had hired on the merits and hire the person he himself had recommended instead. These people "work hard for the Democratic Party's political clubs to get candidates elected [and the] job is a way to reward them," he explained. *Id.* at 25. He held out party leaders' control of the nomination process as a way to discipline her. Some day, he warned, she "would want to become a Supreme Court Justice and . . . the party leaders would not forget this." *Id.* "[W]ithout the 'County's' support," he told her, her Supreme Court nomination "will not happen." *Id.*

The district leader similarly demanded that Lopez Torres "make it right" by "hiring the person referred by 'County,'" but she still refused. *Id.* Later he offered her a second chance at redemption. If she would only hire his daughter as her law clerk, he would see to it that the Democratic Party would nominate her for a Supreme Court justiceship. *Id.* Again she declined.

Over the next several years, Lopez Torres repeatedly sought the Democratic Party's nomination for Supreme Court Justice. Each time the local party rebuffed her because of her "disloyal[ty]" in refusing to hire unqualified party workers or children of party bosses as law clerks. *Id.* at 27. One district leader extolled her as "highly qualified" yet voted against her nomination because she was "an ingrate" who "courted [the original district leader] who supported her for Civil Court, but then decided she didn't need him anymore and denied his daughter a job." *Id.* at 28. During this period, however, Lopez Torres clearly demonstrated that she had enough popular support—within and outside the party—to carry the day among the voters. When she ran for reelection as a Civil Court Judge, the local Democratic Party leaders fielded a primary candidate against her. She won in the primary and then received over 200,000 votes in the general election—more than any Democratic candidate for Supreme Court Justice in Kings County received that year. *Id.* at 27. Her Supreme Court candidacies failed not because she lacked voter support but only because local party leaders controlled whom the voters could vote for. Their support, not the voters', dictated who would become a Supreme Court Justice.

As Judge Lopez Torres's example shows, local party control over the primary process threatens to completely upend judicial independence. These party leaders were so confident of their power to discipline judges that they believed they could demand that a judge hire unqualified applicants or a party boss's child for the judge's most

important and sensitive job position—that of her law clerk. They also believed they had this power not only over Supreme Court Justices, who would need to seek reelection through the process they controlled, but also over other judges, like Judge Lopez Torres, who might someday want to be Supreme Court Justices. They thus leveraged their control over Supreme Court nominations into control over other, lower positions on the judicial employment ladder and over all the other jobs, like law clerk, dependent, in turn, on those positions. Although New York's judicial selection scheme genuflects at the altar of democracy, it prays to a very different god: patronage.

II. BECAUSE NEW YORK'S JUDICIAL NOMINATING CONVENTION IS UNIQUE, THE *LOPEZ TORRES* DECISION DOES NOT IMPLICATE OTHER STATE ELECTORAL STATUTES.

As noted in Part I above, New York's judicial nominating system fails to further either the accountability or the independence of the state trial court judiciary. It is no wonder that New York's system is unique. Given the singularity of the New York system, the Second Circuit *Lopez Torres* decision will have no applicability to the political nominating processes of other jurisdictions. Nonetheless, Petitioners attempt to depict the decision as one of "nationwide" impact and predict state-by-state statutory upheaval as a result. Cert. Pet. at 3. The 34 state convention statutes cited by Petitioners as the basis of this claim, however, are simply not comparable to New York's election law.

A. The New York Judicial Nominating System Is a Distinctive Statutory Scheme That, in Fact, Severely Burdens First Amendment Rights.

Although Petitioners attempt to characterize New York's

judicial nominating system as a creation of party rules and practice, it is actually a product of detailed statutory mandate. Indeed, New York election law severely limits the discretion of political parties, granting them little opportunity to design or operate a more flexible or democratic system of judicial nomination.

The first phase of the judicial nominating process is the primary election at which party members vote for judicial delegates. N.Y. ELEC. LAW §§ 6-106, -124. To appear on the primary ballot, an aspiring delegate is required by law to gather 500 valid signatures from party members residing in the assembly district in which the delegate is running. N.Y. ELEC. LAW §§ 6-136(2)(i), (3). The law further mandates that each assembly district be represented by a convention delegate – a requirement that cannot be waived by political parties. N.Y. ELEC. LAW § 6-124. The second phase of the nominating process is the mandatory convention, which is scheduled, by law, to occur shortly after the primary election. N.Y. ELEC. LAW §§ 6-106, -124, -158. Selection by convention is the exclusive route to gain party nomination, and individual parties may not establish alternate routes. The nominating process ends with the general election at which the justices are elected. N.Y. ELEC. LAW § 8-100(1)(c).

In their review of this "State-created" system, the courts below found that it "functioned in fact" to exclude qualified candidates who lacked party leadership backing and imposed "severe burdens" on voters' rights to associate and vote. Pet. App. 35, 40. Specifically, the courts enumerated several aspects of the statute that serve to unduly impede challenger candidates from competing in the nomination process, including:

1. The statutory requirement that each assembly district in a larger judicial district be represented by at least one delegate creates a geographic and logistical burden on

candidates wishing to recruit and run their own slate of delegates. *Id.* at 11-12, *citing* N.Y. ELEC. LAW § 6-124.

2. The statutory requirement that, within a span of 37 days, a potential delegate must gather 500 valid signatures makes it impossible, in fact, for challenger candidates without the backing of the party apparatus to run a slate of delegates successfully. *Id.* at 12-13, *citing* N.Y. ELEC. LAW §§ 6-134(4), -136(2)(i), (3).

3. The statutory prohibition on providing information on the ballot identifying the judicial candidate(s) whom each aspiring delegate supports further limits voters' ability to exercise their associational rights by electing delegates who support their preferred candidate. *Id.* at 13.

4. The absence of any other mechanism to gain party nomination, *e.g.* through petition, post-convention caucus, assembly or election, means there is no "safety valve" in the system to protect voters and candidates otherwise shut out of the process. *See, e.g.*, N.Y. ELEC. LAW § 6-106.

The lower courts found that the effect of this unique collection of statutory barriers was to impose severe burdens on the constitutional rights of candidates and voters, warranting invalidation of the law. *Id.* at 70-76.

B. The State Election Laws Cited by Petitioners Are Distinguishable from the Challenged New York Statute, and Thus Will Not Be Affected by the *Lopez Torres* Decision.

No state matches New York's "byzantine and onerous" judicial nominating system. Pet. App. 69. As the above description reveals, the New York system has three key characteristics: it is mandated by statute; it allows political parties very little autonomy to structure their nomination

process; and it excludes any candidates without party leadership backing. The convention systems in the 34 states cited by Petitioners rarely have any of these characteristics, much less the combination of all three. Over two-thirds of the 34 cited state election statutes do not even mandate the use of a convention to nominate candidates for public office. Even in those few states where state law mandates use of a nominating convention, the circumstances are very limited and the political parties enjoy broad discretion to determine the convention structure.

(i) Most State Statutes Do Not Mandate the Nomination of Candidates for Public Office by Convention.

Twenty-four of the 34 states cited by Petitioners do not even require political parties to use a convention to nominate candidates for public office.[4] Of these 24, seven of these state

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[4] Included in the category of the 24 "non-mandatory convention" states are several sub-categories:

The first sub-category consists of the seven states that provide for conventions only to select *party* officers or to conduct internal *party* business, *see infra* note 5.

The next sub-category is the 14 states that allow, but do not mandate, parties to use conventions for nominations for public office: ALA. CODE §§ 17-13-2, -50 (option of convention); ARIZ. REV. STAT. § 16-342 (option of convention to fill vacancies in certain circumstances); ARK. CODE ANN. § 7-7-104 (option of convention to fill vacancies); GA. CODE ANN. § 21-2-180 (convention is an option only for minor parties, *see* § 21-2-2(23)); KY. REV. STAT. ANN. § 118.325 (convention is an option only to fill vacancies); MD. CODE. ANN. § 5-701, -703.1 (granting only minor parties the authority to choose how to nominate candidates); N.M. STAT. ANN. §§ 1-8-1, -2 (convention is an option only for minor parties); OR. REV. STAT. § 248.009 (convention is an option only for minor parties); S.C. CODE ANN. §§ 7-9-70, 7-11-10, -30 (provides option of nominating by primary, convention or petition); TENN. CODE ANN. § 2-13-202, -203 (grants party authority to determine method of nomination for certain offices); UTAH CODE ANN. § 20A-9-404 (optional convention); VA. CODE

statutes provide for conventions only to nominate or select candidates for *party* office, or to conduct other internal *party* business.[5] Party conventions that have no connection to public elections are not relevant to the consideration of the New York judicial conventions. *See* Pet. App. 39

ANN. §§ 24.2-508, -509 (grants party authority to determine method of nomination); WASH. REV. CODE § 29A.20.121 (convention is an option only for minor parties); W. VA. CODE § 3-5-22 (convention is an option only for minor parties).

The next sub-category consists of the two states that allow a party to select by convention those candidates it wishes to endorse, but provide that the party nominee will ultimately be selected by primary election. COLO. REV. STAT. § 1-4-102; CONN. GEN. STAT. § 9-382. Unlike the New York judicial convention, which is the exclusive route to party nomination, these "endorsement" conventions are but one route by which a candidate can access the primary election ballot. In Colorado, a candidate can secure a place on the primary election ballot *either* by earning 30 percent of the votes at the party convention, *or* by meeting petitioning requirements. COLO. REV. STAT. §§ 1-4-102, -103. In Connecticut, a party may select its preferred candidate at a convention, but then that party-endorsed candidate must compete with all other eligible candidates in a primary election. CONN. GEN. STAT. § 9-415.

Finally, the Florida convention statute cited by Petitioners has been repealed. *See* FLA. STAT. ANN. §99.0965 (repealed by 2007 Fla. Sess. Law Serv. Ch. 2007-30 (C.S.H.B. 537), effective May 21, 2007).

[5] The party conventions in Delaware, Idaho, Illinois, Maine, Ohio, New Hampshire, and Rhode Island do not determine the nomination of candidates for public office, but are limited to *party* business. *See* DEL. CODE ANN. tit. 15, § 3113 (optional convention to nominate candidates for party offices and to formulate party platform); IDAHO CODE § 34-707 (mandatory conventions only for adoption of platform and election of party officers); 10 ILL. COMP. STAT. 5/7-9 (mandatory county and state conventions only for selection of party officers, adoption of platform, and selection of delegates to national nominating conventions); ME. REV. STAT. ANN. tit. 21-A, § 321 (mandatory convention only to nominate candidates for party offices, select presidential electors and formulate platform); N.H. REV. STAT. ANN. § 667:21 (mandatory convention only to formulate platform and nominate presidential electors); OHIO REV. CODE ANN. § 3513.11 (same); R.I. GEN. LAWS § 17-12-13 (same).

(recognizing that it is when the activities of political parties are an "integral part of the election machinery" that constitutional protections extend to party members); *United States v. Classic*, 313 U.S. 299, 318 (1941).

The remaining 17 states allow the use of conventions to nominate candidates for *public* office, but do not make such conventions mandatory. Some of these states provide political parties with a range of options for nominating candidates for public office. For instance, South Carolina provides that nominations "may be by political party primary, by political party convention or by petition." S.C. CODE ANN. § 7-9-70. The other states of this subgroup permit, but do not require, the use of conventions for limited or specific purposes, such as for filling vacancies in office or for minor party candidate nominations. New Mexico's election law, for example, requires major parties to nominate candidates by primary election, but allows minor parties to choose from various methods of nomination, including conventions. N.M. STAT. ANN. § 1-8-1. Because the use of conventions in these 17 states is by party choice, not statutory mandate, the systems are wholly distinguishable from New York's judicial nominating conventions.

(ii) Six States Mandate Nominating Conventions Only in Narrow Circumstances.

Four states – Texas, Kansas, North Carolina and Wyoming – require only minor or new parties to nominate their candidates for public office by conventions. TEX. ELEC. CODE ANN. § 181.003; KAN. STAT. ANN. § 25-202(b); N.C. GEN. STAT. § 163-98; WYO. STAT. ANN. §§ 22-4-303, -406. For instance, Texas law requires minor parties to nominate their candidates by convention, while simultaneously mandating primary elections for major party nominations. TEX. ELEC. CODE ANN. §§ 172.001, 181.003. Two states – Nebraska and North Dakota – require the use of conventions

only for the purpose of filling vacancies in public offices. N.D. CENT. CODE § 16.1-13-14; NEB. REV. STAT. § 32-721. It is important to note, however, that although these statutes require conventions in certain situations, they allow parties to determine all significant aspects of delegate selection and convention design.

Further, the use of conventions in these narrow circumstances imposes minimal burdens on the associational rights of the rank-and-file, and is justified by state interests that are not present in the New York context. Unlike a major party's convention, the small size of a minor party – and the corresponding scale of its convention – facilitates participation by party members, and makes it unlikely that party leaders can insulate themselves from the preferences of the majority.[6] The state also has a clear interest in avoiding the costs of conducting primary elections for parties with small memberships, and in preventing voter confusion by limiting the number of candidates who appear on the primary ballots. In the same vein, because vacancies are rare and unforeseeable, using a convention to fill a vacancy does not provide party leaders with any real opportunity to consolidate power over party nominations. Further, the state interest in expeditiously filling open offices and providing for continuity of representation is self-evident.

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[6] Because minor parties by definition have only received a small percentage of the electorate's votes, their nominee is unlikely to be the victor in the general election. The concern that party leaders, by controlling the nominating convention, effectively control the outcome of the general election is thus not pertinent. This situation stands in sharp contrast to New York judicial races, where *de facto* one-party rule by one of the major parties is common. Pet. App. 32 (noting that evidence showed that one-party rule is "the norm" and that in between 1990 and 2002, over half of the State's elections for Supreme Court Justice were uncontested); *see also supra* Section I.B.

(iii) Four States Require Conventions to Nominate Candidates for Certain Public Offices, but Grant Political Parties Broad Discretion to Structure the Process.

Only four states – Iowa, Indiana, Michigan, and South Dakota – require the use of a convention to nominate candidates for public offices. In contrast to New York, however, these four states' statutes reserve for the political parties significant decision-making authority over the design and operation of their delegate selection and convention processes. Consequently, these state systems involve less statutory intrusion into the associational rights of both the party organization and its members.

Iowa law requires that candidates for lieutenant governor be nominated at the parties' statewide conventions, but allows the conventions to be held *after* the gubernatorial primary election. IOWA CODE. ANN. §§ 43.123, .107. The use of a post-primary convention thus enables the nominee for Governor to be involved in the selection of the lieutenant governor, who will be his or her running mate in the general election. This specific justification for nominating by convention is, of course, not applicable to New York's judicial nominating convention. Further, in Iowa, the apportionment of delegates and other aspects of delegate selection, as well as the procedures of the convention, are left to the discretion of political parties and are not mandated by statute.

Although Indiana law requires all parties to use statewide conventions to nominate candidates for Lieutenant Governor, Secretary of State, Auditor of State, Treasurer of State, Attorney General, and Superintendent of Public Instruction, it allows the state committee of each party to determine the

procedure for nominations. *See* IND. CODE ANN. § 3-8-4-2; *see also* Ind. Repub. Party Rule 220.[7] Specifically, the statute allows the parties to determine whether the delegates are to be elected from districts or at large in each county, the number of districts, and the boundaries of such districts. IND. CODE ANN. §§ 3-8-4-3 to -5; 3-10-1-4(b)(2). *See also* Ind. Dem. Party Rule 17(a)(7) (governing apportionment of delegates across counties);[8] Ind. Repub. Party Rules 186, 187 (governing number of delegates per district, whether delegates elected by district or at-large and district boundaries).

Similarly, South Dakota law requires that major parties nominate candidates for certain public offices, including lieutenant governor, attorney general, secretary of state, state auditor and state treasurer. S.D. COD. LAW § 12-5-21. Again, however, the manner in which delegates are selected and the structure of the nomination process are matters of party choice, not statutory mandate as in New York. S.D. COD. LAW §§ 12-5-1 to -22. *See also* S. Dak. Repub. Rules, Section VIII, 1.A-C (providing that delegates to state convention are elected in primaries, or eligible by reason of office); S. Dak. Dem. Const., Art. IX, §§ 2, 4 (setting forth criteria for state convention delegates and procedure for selection).[9]

Michigan, the fourth and last state, requires that candidates for certain offices, including Lieutenant Governor, Attorney General, and Secretary of State, be nominated by

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[7] Available at http://www.indgop.org/rulesrevision06.pdf (last visited July 10, 2007).

[8] Available at http://www.perrycountydemocrats.com /pdfs/InDem-PartyRules.pdf (last visited July 10, 2007).

[9] Available at http://www.sddp.org/index.asp?Type=B_LIST&SEC={FC4EB604-9510-4EEB-9843-F41B511FE2AF} (last visited July 10, 2007).

party convention. MICH. COMP. LAWS CONST. art. 5, § 21; MICH. COMP. LAWS ANN. § 168.72. The state law, however, refrains from any significant intrusion into party autonomy. *See, e.g.*, MICH. COMP. LAWS ANN. § 168.620a (expressly providing that election statute will be preempted by party rule in the event of conflict at certain stages of the nomination process). Parties determine the apportionment of state convention delegates across jurisdictions and who votes at the convention. MICH. COMP. LAWS ANN. § 168.595, .598. Further, the burdens placed on the party rank-and-file members in New York are manifestly not present in Michigan: for instance, state Democratic Party rules allow *any* voter to vote at the party's statewide nominating convention. Mich. Dem. Party Rules, Art. 4B.

* * * *

In sum, a review of the 34 states cited by Petitioners reveals that *none* of their candidate nominating systems resemble the system operating in New York. Only four state statutes even mandate that major parties hold conventions to nominate candidates for public office at all. Petitioners' professed concern that the *Lopez Torres* decision will threaten election laws across the nation is unfounded.

Petitioners' concern also rests upon pure legal speculation. Even if another state's system more closely resembled New York's judicial nominating conventions, in practice it might not operate to "freeze out" challenger candidates or to deprive party members of associational and voting rights. The district court below applied strict scrutiny to New York's judicial nominating scheme only after it concluded, upon careful analysis, that "the electoral scheme function[ed] in fact" to severely burden the exercise of associational rights. Pet. App. 36. No court has performed any such analysis of the actual operation of the electoral statutes, for instance, in Iowa, Indiana, Michigan and South

Dakota. It is unfounded speculation, at best, to believe that any of these laws in fact impose excessive burdens on the constitutional rights of candidates and voters. It is therefore equally conjectural that these statutes may be impacted by the *Lopez Torres* decision.

III. THE SECOND CIRCUIT'S DECISION IS NOT A BLANKET BAN ON THE USE OF PARTY CONVENTIONS TO MAKE CANDIDATE NOMINATIONS.

In addition to the unfounded assertion that the *Lopez Torres* decision poses a threat to the convention statutes in existence in 34 states, Petitioners also advance the broader claim that the Second Circuit – and those parties that support its decision – in actuality oppose *any* nomination system that does not "proceed by primary or its functional equivalent." Cert. Reply, at 2; *see also* Petitioner Br. at 20 ("the Second Circuit's ruling would . . . requir[e] as a practical matter that all nominations proceed by primary").

Petitioners are attacking a straw man. Nowhere does the Second Circuit demand that every existing nominating convention system function exactly like a primary election. Instead, the Second Circuit simply held that the First Amendment "prohibits a state from maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process." Pet. App. 44. That is a far cry from the Petitioner's bald assertion that "no true convention system could be constitutional under the Second Circuit's extreme view of the First Amendment." Cert. Pet. at 15. The decision below properly leaves the Legislature free to devise a judicial selection system that is free from constitutional infirmities. There may well be a variety of potential statutory "fixes" that would allow New York to devise a system that serves the State's interests and still respects the constitutional rights of party members.

Petitioners appear to concede as much in their critique of the district court's choice of remedy. Petitioners argue that the court below should have issued a more tailored injunction, striking only those aspects of the law that burdened First Amendment rights, and leaving intact the basic convention structure. *See* Cert. Pet. at 17 (suggesting an injunction limited to, *e.g.*, "(1) reducing the number of petition signatures required; (2) decreasing the number of delegates; (3) extending the time period before the convention to give more time for candidates to lobby and delegates to deliberate"). Implicit in the Petitioners' proposed remedy, however, is their acknowledgment that the convention system could operate in a more democratic and accessible manner. Given the possibility for reforming the convention process to remedy First Amendment violations while retaining some of its fundamental structure, Petitioners cannot credibly maintain that the Second Circuit holding only allows nomination through primary elections.

IV. PETITIONERS' CONCERNS REGARDING POTENTIAL INCONSISTENCIES BETWEEN THE HOLDING IN *LOPEZ TORRES* AND THE PRESIDENTIAL NOMINATING SYSTEM ARE MISPLACED.

As the survey of the statutes of 34 states confirms, no other state nominating system even approximates New York's singular hybrid election-convention scheme. In apparent recognition of the weakness of their state-by-state argument, Petitioners spend much time speculating about potential tension between the *Lopez Torres* decision and the presidential nominating system. Petitioners Br. at 9-11; NY-AG Br. at 21-23. The crux of Petitioners' argument is that the presidential nominating convention – or at least its historical antecedents – would not likely pass muster under the construction given the First Amendment by the *Lopez Torres*

decision. This argument, however, rests upon two premises: that the presidential nominating convention is comparable to a state's individual nominating system such that the *Lopez Torres* decision would be applicable; and that the presidential system is yet more restrictive of party members' constitutional rights than the New York system. Neither is correct.

A. The Presidential Nominating System Is Not a Meaningful Point of Comparison.

The initial question raised by this line of argument is whether the *Lopez Torres* case – which analyzed a state's statutory regulation of its own "election machinery" – has any bearing on the constitutionality of the presidential nominating convention. This Court has recognized that the nomination of presidential candidates is unique, and implicates different state, party and individual interests. *Cousins v. Wigoda*, 419 U.S. 477, 489-91 (1975). The presidential nomination is wholly different from a nomination for state office, both because it is vast in scale, requiring the reconciliation of multiple "coalitions" within the party "cutting across state lines," and because the final decision is national in scope and effect. *Id.* at 490.

Petitioners also fail to realize that – unlike the New York judicial nominating convention – the presidential nominating system is not a creature of statute, but instead structured principally through party rule and practice. *Democratic Party of U.S. v. LaFollette*, 450 U.S. 107, 123 (1981). For instance, political parties determine the apportionment of delegates to the various states, the composition of each state's delegation and the qualifications of primary voters. *See, e.g.*, Republican National Committee Rules 13, 14, 15.[10] Further, as entities

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[10] Available at http://www.gop.com/About/AboutRead.aspx?AboutType=4 (last visited July 9, 2007).

with associational rights, political parties enjoy greater latitude than do states to regulate their nomination processes. Requirements that are lawful if imposed by party rule or regulation may be unconstitutional if mandated by statute. *See, e.g., Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987) (upholding rule of Democratic National Party requiring equal representation of the sexes in state delegations to the national convention).[11] That national political parties allow certain procedures in the presidential nominating process does not necessarily mean that a state can mandate similar ones in the state nominating process. Petitioners' attempt to justify New York's *statutory* convention scheme by pointing to national conventions governed by *party rule and practice* is thus unfounded.

B. Compared to the New York System, the Presidential Nominating Convention Is More Open to Party Member Participation, and More Conducive to Associational Activity.

Because the presidential system has no connection to state nomination systems, it is irrelevant to deciding whether the decision of the Second Circuit is correct. If this Court were to review the presidential nominating system, however, it would find that the current system, in practice, surpasses the New York judicial nominating system in its acceptance of the participation of rank-and-file members and its deference to their choices.

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[11] Indeed, where in conflict, a national party rule trumps a state statute in the context of the presidential nominating process. In *Cousins*, 419 U.S. at 489-90, this Court held that the Democratic Party could exclude a slate of delegates selected pursuant to Illinois state law because its composition violated certain national party guidelines. *See also LaFollette*, 450 U.S. at 123-24 (upholding Democratic National Party refusal to seat Wisconsin's presidential delegation because it was elected in an *open* presidential primary in contravention of national party rule).

Before beginning an analysis of the current presidential system, *amici* note as a threshold matter that Petitioners' focus on *past* presidential nominating conventions is inapt. *See, e.g.*, Petitioners' Br. at 9-11. The history of presidential nominating conventions is irrelevant to the constitutionality of the present New York system or the validity of the *Lopez Torres* decision. Even if we assume the accuracy of Petitioners' description of past systems, Petitioners make no mention of judicial authority upholding the historic convention practices that they so enthusiastically detail. Unless a court of law considered and upheld past convention systems, their mere existence does not speak to their legality.

The modern presidential nomination process consists of two stages: (1) the pre-nomination phase, in which delegates to the national party conventions are elected in either state primary elections or caucuses; and (2) the national convention, in which the delegates nominate the party's candidates for President and Vice President. Because the great majority of delegates selected in the first stage are pledged to a particular candidate, the convention in the second stage does little more than ratify the earlier choices of the voters of the individual states. ANDREW E. BUSCH, OUTSIDERS AND OPENNESS IN THE PRESIDENTIAL NOMINATING SYSTEM 15 (1997) (stating that the lack of delegate discretion meant that the outcome of no presidential nominating convention has been in doubt since the 1976 Republican nomination campaign).

The locus for party member participation is thus the first stage, in the primaries and caucuses of the individual states. The vast majority of states allow voters to elect in primary elections delegates who are pledged to a particular candidate; party members thus can directly express their preference as to their party's nominee. In the 2000 elections, for instance, 85.2% of Democratic delegates (in 38 states and the District of Columbia) and 90.1% of Republican delegates (in 41 states

and the District of Columbia) were scheduled to be selected in states holding primaries. *See* CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL ELECTIONS IN THE UNITED STATES: A PRIMER (April 17, 2000) 7 ("CRS RPT."). The remaining states use a caucus or convention process to elect delegates to the national convention. *Id.* at 10. Although there is considerable variation in state party rules, the caucus process in most states has the same multi-tiered structure. NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, 2000, S. DOC. NO. 106-16, at 145 (2000) ("2000 PRES. ELECTION"). It typically begins with a local precinct caucus where the rank-and-file members select delegates who will represent their preference of presidential candidate at the county caucus or convention. *Id.*; *see also* CRS RPT. at 10-11.[12] The county convention delegates in turn select delegates for the state convention, who in turn select the presidential convention delegates according to party rules. CRS RPT. at 10-11. Thus, the preferences of the party rank-and-file are communicated up the party hierarchy.

The key distinction between the presidential nominating caucus and the New York judicial convention is thus the "pledged" delegate. The presidential system generally allows rank-and-file party members to express their preferences by selecting delegates who are committed by law or practice to vote for a certain candidate.[13] The New York system in

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[12] At the precinct-level caucus, the practice typically is to divide attendees into groups based on the candidate they support. Each "candidate support group" then receives delegates in proportion to its percentage of the attendees at the larger caucus meeting. *See* AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY AND POLITICAL CHANGE 17 (Harvey L. Schantz, ed., 1996). The "process of discussion, allocation and selection of delegates" then is repeated at county and state caucus levels. *Id.*

[13] Democratic National Committee rules expressly require that the delegates selected in primaries or caucuses declare their presidential preference or state that their status is uncommitted. *See* Democratic Party

contrast, silences members by requiring that they vote in "blind primaries" for independent delegates. Thus, the use of presidential nominating caucuses in certain states does not, as Petitioners suggest, cast doubt on the relative openness of the presidential nominating system. *See, e.g.*, NY-AG Br. at 22. Petitioners are missing the point: not all conventions are created equal. In the 1980 presidential convention, for instance, only 3.5% of the 3,331 Democratic delegates and only 5% of the 1,994 Republican delegates were uncommitted.[14] LEON D. EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 97 (1986). By contrast, in *every* New York judicial nominating convention, *all* of the delegates remained uncommitted. It is therefore extraordinary to maintain, as Petitioners do, that the presidential system is the equivalent of the New York system, or that the putative constitutionality of the former somehow buttresses the legitimacy of the latter.

CONCLUSION

For all these reasons, *amici* respectfully urge the Court to affirm the Second Circuit judgment below.

Delegate Selection Rules 11, 12, *printed in* 2000 PRES. ELECTION at 167-70 (requiring all candidates for delegate to declare presidential preference or uncommitted status). In contrast, the Republican Party does not mandate by national rule a declaration of preference, and consequently, its delegate selection process is "less uniform and more dependent on different state party approaches." CRS RPT. at 11.

[14] Following the 1980 presidential election, the Democratic Party passed a rule creating a new category of "superdelegates" at the convention, comprised of party and public officeholders at the federal and state level, who had the option of remaining uncommitted to any candidate. ROBERT E. DICLERICO & JAMES W. DAVIS, CHOOSING OUR CHOICES: DEBATING THE PRESIDENTIAL NOMINATING PROCESS 19-20 (2002). The rule, however, set the number of superdelegates at no more than 14% of all convention delegates, and in practice, only a small percentage of delegates – for example, only 5% of the total delegates at the 1984 convention – chose to remain "unpledged." EPSTEIN, at 98.

Dated: July 13, 2007

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APPENDIX A

Thomas Mann and Norman Ornstein are political scientists at the Brookings Institution and the American Enterprise Institute, respectively. In their 38-year careers, they have individually and jointly written extensively about Congress, elections, redistricting, and American politics and government generally. Active in congressional, election, campaign finance, and other institutional reform efforts, their professional lives have been focused on the health and vibrancy of American political institutions. Their biennial book Vital Statistics on Congress is in its twelfth edition. Their latest book, The Broken Branch, was published by Oxford University Press in June 2006. Their joint AEI/Brookings efforts have included the Renewing Congress Project, Five Ideas for Practical Campaign Reform, the Transition to Governing Project, the Alternatives to the Independent Counsel Project, the Continuity of Government Commission, and the Election Reform Project. Mann is co-editor of Party Lines: Competition, Partisanship, and Congressional Redistricting, recently published by Brookings.

The Reform Institute is a not-for-profit 501(c)(3) educational organization, representing a unique, independent voice working to strengthen the foundations of our democracy. The Institute champions the national interest by formulating and advocating meaningful reform in vital areas of public policy, including campaign finance and election reform, energy independence and climate stewardship, homeland and national security, economic opportunity, and immigration reform. Former Congressman Charles Bass (R-NH) serves as Chair of the Board. The Reform Institute's campaign and election reform agenda has three main roles: (1) to reduce political corruption and the appearance of corruption; (2) to promote discussion about how best to reform election registration and voting procedures in order to increase transparency, competition, and meaningful citizen

participation in the democratic system; and (3) to promote and defend citizen reform initiatives that seek to open the doors of the voting process. The present case concerns whether a state can require a political party to run a judicial nomination process so as to effectively deny party voters any voice. It directly implicates the Reform Institute's second role of increasing meaningful citizen participation in the democratic system.

The Campaign Legal Center, Inc. ("CLC") is a nonpartisan, nonprofit organization that works in the areas of campaign finance, election law, and governmental ethics. CLC represents the public interest in administrative and legal proceedings where the nation's campaign finance and election laws are enforced: at the Federal Election Commission (FEC), the Internal Revenue Service (IRS), and in federal and state courts. In the campaign finance area, CLC generates legal and policy debates about disclosure, political advertising, contribution limits, enforcement issues, and many other matters. CLC also works to reform and enforce federal and state law in the areas of government ethics, lobbying disclosure and electoral reform, and currently leads a coalition of ten government watchdog groups working to improve these areas. The CLC has provided legal counsel to parties and *amici* in numerous cases on the subject of electoral integrity, including representing intervening defendants in the landmark campaign finance cases, *McConnell v. FEC*, 540 U.S. 93 (2003), and *FEC v. Wisconsin Right to Life*, 551 U.S. ___ (June 25, 2007). The Campaign Legal Center has also participated as *amicus curiae* in various cases addressing judicial and government integrity, such as *Valdes v. United States*, No. 01 CR 00154-010020 (D.C. Cir. Feb. 9, 2007) and *Avery v. State Farm Mutual Automobile Insurance Company*, 547 U.S. 1003 (2006).

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In the Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *ET AL.*,
PETITIONERS

v.

MARGARITA LÓPEZ TORRES, *ET AL.*,
RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE MID-MANHATTAN BRANCH OF THE NAACP AND THE METROPOLITAN BLACK BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In *American Party of Texas* v. *White*, 415 U.S. 767 (1974), this Court held that the Constitution does not necessarily forbid party conventions "in preference to" party primaries as the means for political parties to choose their candidates for elective office. In the decision below, the Second Circuit affirmed a ruling requiring New York's political parties to nominate candidates for trial-court judge by party primaries rather than conventions. In so doing, the Second Circuit invalidated the statute governing judicial nominations *in its entirety*, even though only certain portions of the statute were deemed unconstitutional.

The question addressed by *amici*, which is subsumed within the question presented by petitioners, is this:

> May a federal court strike down an entire state statute absent a finding that the legislature's purpose in enacting the statute would be frustrated by removing only its constitutionally defective portions?

This question was addressed by the courts below and is "not foreign to the parties." *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (considering retroactivity argument raised only by *amici*).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION AND INTERESTS OF *AMICI CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. Under New York Law, Which Controls Here, Non-Defective Portions Of A Statute Must Be Preserved If The Legislature Would Prefer That Result 7

II. The Courts Below Failed To Conduct The Required Severability Analysis, And In So Doing Erred In Eliminating New York's Entire Convention Statute. 11

CONCLUSION 17

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

CASES:

American Party of Texas v. *White*,
415 U.S. 767 (1974) ..... i, 14

Ayotte v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006) 6

Buckley v. *Valeo*,
424 U.S. 1 (1976) 8

Dorchy v. *Kansas*,
264 U.S. 286 (1924) 6

Falion v. *State Bd. of Elections*,
380 N.Y.S.2d 355 (N.Y. App. Div. 1976) 14

Hynes v. *Tomei*,
706 N.E.2d 1201 (N.Y. 1998) 6

Leavitt v. *Jane L.*,
518 U.S. 137 (1996) 6

Lopez Torres v. *New York State Bd. of Elections*,
411 F. Supp. 2d 212 (E.D.N.Y. 2006) 2, 4-5, 12-14

Lopez Torres v. *New York State Bd. of Elections*,
462 F.3d 161 (2d Cir. 2006) 5, 12, 14

Norman v. *Reed*,
502 U.S. 279 (1992) 14

In re Orans,
206 N.E.2d 854 (N.Y. 1965) 9

People ex rel. Alpha Portland Cement Co. v. *Knapp*,
129 N.E. 202 (N.Y. 1920) 7-8, 15

Rathbone v. *Wirth*,
45 N.E. 15 (N.Y. 1896) 10-11

Reynolds v. *Sims*,
377 U.S. 533 (1964) 9

Schieffelin v. *Goldsmith*,
170 N.E. 905 (N.Y. 1930) 9-11, 16

Skaneateles Waterworks Co. v. *Village of Skaneateles*,
55 N.E. 562 (N.Y. 1899) 7, 16

Smith v. *Allwright*,
321 U.S. 649 (1944) 15

Storer v. *Brown*,
415 U.S. 724 (1974) 14

Teague v. *Lane*,
489 U.S. 288 (1989) i

Terry v. *Adams*,
345 U.S. 461 (1953) 15

WMCA, Inc. v. *Lomenzo*,
377 U.S. 633 (1964) 9

Matter of Westinghouse Elec. Corp. v. *Tully*,
470 N.E.2d 853 (N.Y. 1984) 7

STATUTES:

N.Y. Election Law § 6-124 ..... 13, 15

MISCELLANEOUS

Letters from The Federal Farmer to The Republican No. 3 (Oct. 10, 1787), in 1 *The Debate on the Constitution* 245 (Bernard Bailyn ed. 1993) 8

Publius [Alexander Hamilton], *The Federalist* No. 78 (May 28, 1788) in 2 *The Debate on the Constitution* 467 (Bernard Bailyn ed. 1993) 8

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The severability analysis in the decision below warrants reversal even if the Court otherwise affirms that decision. The Second Circuit found that New York's statutory system for nominating party candidates for judicial elections imposed severe burdens on the First Amendment rights of voters and candidates, and struck down the nomination statute in its entirety. Before striking down the entire statute, however, the court was required by long-standing precedent to perform a severability analysis to determine whether the non-defective portions of the statute could be preserved. Had the Second Circuit performed that analysis, it would have concluded that the severe burdens it found were traceable to an isolated portion of the statute; that the Legislature's purpose in enacting the statute would not be frustrated without the burdensome provisions; and that a more limited remedy was required.

The Second Circuit's severability analysis, moreover, not only led to the wrong result in this case, it also has profound implications for future cases in that Circuit and elsewhere. The Second Circuit's approach signals an enormous expansion of judicial power of which this Court has repeatedly disapproved, and that approach should be rejected here as well.

The severability issue in this case is of particular concern to *amici curiae* Mid-Manhattan NAACP and Metropolitan Black Bar Association, which support equal protection for African-Americans and other minorities in New York City.[1] Both organizations, which are described in more detail in the Appendix, include sitting black Su-

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[1] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* and its counsel has made a monetary contribution to the preparation or submission of this brief.

preme Court Justices in their membership, and both have representatives on the judicial screening panel that evaluates candidates for Supreme Court Justice for the First Judicial District—a panel recognized by the district court as "the best in the state." *Lopez Torres* v. *New York State Bd. of Elections*, 411 F. Supp. 2d 212, 231 (E.D.N.Y. 2006).

As organizations with a long history of championing the equal access of blacks and other minorities to elective office in New York, *amici* are strong proponents of New York's judicial convention system. *Amici* are especially proud of the record of minority participation that convention system has produced in New York City. *Amici* believe, however, that the decisions below unnecessarily compromise the success of New York's judicial election procedures. Even if portions of the relevant statutes could not be upheld, wholesale rejection of the convention statute was inappropriate. *Amici* thus urge the Court to reverse the decision below and thereby ensure that the remedy in this case does not needlessly sacrifice the diversity benefits of the existing convention system.

STATEMENT

1. In 1921, the people of New York, acting through their duly elected legislators, expressed a clear preference for selecting nominees for the office of New York State Supreme Court Justice through a convention system, rather than direct primary elections.

In more recent years, this convention system has promoted the public welfare by enabling minority candidates to seek and obtain the office of Supreme Court Justice in proportion with the tremendous diversity in New York City. For example, as a result of the convention system, the Supreme Court bench in New York County is currently 44.7 percent minority.[2] Of the 38 Supreme Court

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[2] Defendants' Corrected Proposed Findings of Fact in Opposition to Plaintiffs' Motion for Preliminary Injunction, *Lopez Tor-*

justices in New York County, 22 are women, nine are African-American, four are Hispanic, and two are Asian-American.[3] In 2002, the First Judicial District convention nominated:

- Rolando Acosta, a Dominican man;
- Carol Edmead, an African-American woman;
- Troy Webber, an African-American woman;
- Rosalyn Richter, a disabled woman;
- Doris Ling-Cohan, an Asian-American woman; and
- Richard Price, an Orthodox Jewish man.[4]

In the district court, petitioners presented voluminous testimony that a primary system could never achieve the kind of diversity that the convention system does, mainly because "[t]he best single determinant of success in a direct election is the size of the candidate's campaign chest," and minorities tend to have disproportionately smaller fundraising resources.[5] One of petitioners' experts testified that without the convention system "you would have a bunch of rich people [elected] to the bench and there would be no minorit[ies] sitting up there at all."[6] According to this expert, the existing convention system is "a little

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res v. *New York State Bd. of Elections*, No. 04-cv-1129-JG-SMG (E.D.N.Y. Jan. 26, 2005) (Docket No. 112) ("Defendants' Proposed Findings"), ¶ 241.

[3] *Ibid.*

[4] *Id.* ¶ 239.

[5] *Id.* ¶ 247.

[6] *Id.* ¶ 248.

fairer to ordinary people."[7] Another expert testified that primaries would result in "an entirely white bench."[8]

2. Although the convention system was democratically enacted and has done much to foster diversity on the bench, the courts below held that the statute enacting that system violates the First Amendment and cannot be applied in its current form. The district court ruled that the statute imposed severe burdens on the First Amendment rights of voters and candidates to have meaningful choice in the election of Supreme Court Justices, without the justification of sufficiently compelling state interests. 411 F. Supp. 2d at 243-255. The district court based this ruling primarily on anecdotal evidence of respondents' difficulties in obtaining the nomination of their parties without the support of party leadership. *Id.* at 231-239.

According to the district court, several features of the judicial election statute were responsible for respondents' alleged difficulties, including: (1) the number of assembly districts from which a candidate must field delegates to the conventions; (2) the number of delegates each candidate must run within each assembly district; (3) the number of signatures each candidate must obtain for each delegate within a 37-day period; (4) the prohibition of identifying the candidate each delegate supports on the ballot; and (5) the impracticality of lobbying delegates to change their votes prior to and at the conventions themselves. *Id.* at 217-230.

Based on its finding of a First Amendment violation, the district court enjoined the operation of the entire New York judicial convention system and ordered that direct primary elections be held unless the Legislature can implement a new system before the next election cycle. *Id.* at 255-56. The district court did not examine whether the

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[7] *Ibid.*

[8] *Id.* ¶ 249.

convention system could still function in the absence of the provisions it found too burdensome, instead concluding that a primary system was preferable because it "assure[s] that intraparty competition [will be] resolved in a democratic fashion." *Id.* at 256 (citation omitted).

The Second Circuit affirmed the district court's findings in their entirety. *Lopez Torres* v. *New York State Bd. of Elections*, 462 F.3d 161, 208 (2d Cir. 2006). The Second Circuit acknowledged the Legislature's preference for holding conventions rather than primaries, as well as the obligation of federal courts not to "nullify more of a legislature's work than is necessary." *Id.* at 171-172, 205. But the court failed to examine whether nullifying the entire convention statute was the least invasive way to remove its constitutional defects. Instead, the court conflated the required practice of striking defective provisions with the impermissible practice of "rewriting" or "modifying" them. *Id.* at 206.

In reviewing the district court's requirement that primaries be held in the next election cycle, the Second Circuit considered only two options—striking down the entire convention system and leaving a procedural void for selecting candidates, or striking down the entire convention system and ordering primaries. *Id.* at 206-207. This false dichotomy omitted the option of striking down only the defective portions of the convention system and leaving the remainder of that system in place.

SUMMARY OF ARGUMENT

Even if the Court affirms the Second Circuit's conclusion that New York's convention statute violates the First Amendment in some respects, the Court should reverse the decision below because it nullifies a greater portion of the statute than necessary to remedy those asserted constitutional defects. To prevent overreaching by the lower federal courts, this Court has provided strict rules for determining how to fashion equitable relief when striking

down defective statutes. Those rules were not followed in the decisions below.

The correct approach, following a finding that certain features of New York's judicial convention procedures were unconstitutional, would have been to examine whether the remainder of the statute could function in a manner consistent with the Legislature's intent with the defective portions removed. The Second Circuit did not perform that analysis.

Had it done so, the court below would have seen that the Legislature clearly preferred nominating judicial candidates by convention, and that the convention statute could still function robustly with the offending features removed. The result would have been to strike down only the offending features and to leave the rest of the convention statute intact.

Instead, the Second Circuit imposed upon New York a party-primary system that its Legislature expressly discarded in 1921 and that its voters still do not want today. Prominent among the reasons New York's voters want to preserve the convention system is its proven track record of promoting minority representation in the New York judiciary. But the decision below replaces that process with one preferred, as a matter of public policy or political theory, by unelected federal judges. That decision should be reversed.

ARGUMENT

As a preliminary matter, and contrary to the analysis performed below, the severability of a state statute is governed by state law. See *Leavitt* v. *Jane L.*, 518 U.S. 137, 139 (1996); *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). Thus, although the rule for determining whether a statute is severable is the same under both New York and federal law, compare *Hynes* v. *Tomei*, 706 N.E.2d 1201, 1207 (N.Y. 1998), with *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961, 967 (2006), it is

appropriate to draw upon New York authority in assessing the severability of any provisions found to be constitutionally infirm here.

As we show in Section I, under New York law, non-defective portions of a statute must be preserved if the state legislature would prefer that result. And as we show in Section II, even if some portions of the New York convention statute violate the First Amendment, the New York legislature would clearly prefer to retain a convention system rather than switching to a primary system. That preference should be respected.

I. Under New York Law, Which Controls Here, Non-Defective Portions Of A Statute Must Be Preserved If The Legislature Would Prefer That Result.

For more than 80 years, New York law has been clear that a court finding specific provisions of a statute invalid must determine "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 129 N.E. 202, 207 (N.Y. 1920) (Cardozo, J.). To determine what the Legislature "would have wished," New York courts consider the legislative history of the statute, see *Matter of Westinghouse Elec. Corp.* v. *Tully*, 470 N.E.2d 853, 855 (N.Y. 1984), and ask whether, as a practical matter, the statute would still be capable of functioning "if the knife is laid to the branch instead of at the roots," *Alpha Portland Cement*, 129 N.E. at 207.[9]

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[9] A corollary of this functionality test is that, where a defective portion of a statute was added by later amendment, the pre-amendment version of the statute is functional enough to stand on its own. See *Skaneateles Waterworks Co.* v. *Village of Skaneateles*, 55 N.E. 562, 566-567 (N.Y. 1899) (where unconstitutional provision was not added to statute until 19 years after its passage, "the elimination of that feature of the statute will in no-

The obvious reason for this approach is to keep legislative power out of the hands of the judiciary by limiting a court's power to the minimum necessary to remedy the constitutional infirmity before it. As then-Judge Cardozo explained in *Alpha Portland Cement*, a court's "right to destroy [a statute] is bounded by the limits of necessity." 129 N.E. at 208. "Our duty is to save," he wrote, "unless in saving we pervert." *Ibid.*[10]

New York's highest court has applied these well-settled severability rules to provisions of the State's election apparatus on several occasions, with results that are instructive here.

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wise interfere with the just and proper working out of the general purposes of the act"); *Buckley* v. *Valeo*, 424 U.S. 1, 75-76 (1976) (upholding 1971 campaign spending disclosure statute while striking down 1974 amendment imposing campaign spending limits).

[10] The limits on the power of federal courts to issue broad injunctions were one of the few issues upon which both the Federalists and the Anti-Federalists agreed. When the Federalists sought to include the phrase "all cases, in law and equity" in describing the powers of the judiciary in Article III, the Anti-Federalists were concerned that "equity" powers could be abused to give judges unfettered discretion. See Letters from The Federal Farmer to The Republican No. 3 (Oct. 10, 1787), in 1 *The Debate on the Constitution* 245, 273 (Bernard Bailyn ed., 1993). Alexander Hamilton's reply for the Federalists was not to defend broad equity powers, but rather to deny that judicial power was broad in the first instance. See Publius [Alexander Hamilton], *The Federalist* No. 78 (May 28, 1788), in 2 *The Debate on the Constitution* 467, 468 (Bernard Bailyn ed., 1993). Thus, the Anti-Federalists opposed the grant of equity powers to federal courts for fear of the unfettered discretion they would lend, and the Federalists considered the judiciary to be capable of "no active resolution whatever." *Ibid.* Between them, there is little support for the broad exercise of judicial power in issuing sweeping injunctions when a more limited remedy is available.

For example, in *In re Orans*, 206 N.E.2d 854 (N.Y. 1965), the Court of Appeals examined which portions of the New York State Constitution governing legislative district size could withstand the recently-announced "one man, one vote" apportionment rule of *Reynolds* v. *Sims*, 377 U.S. 533 (1964). Article III of the New York State Constitution contained numerous mechanisms that combined to give sparsely populated areas of the state greater representation per capita in the Legislature than more densely populated areas. This Court invalidated these mechanisms on Fourteenth Amendment grounds in *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633 (1964). The state courts in *Orans* were left to sort out which other portions of Article III could be preserved in light of *WMCA*.

Citing Judge Cardozo's instructions in *Alpha Portland Cement*, the Court of Appeals in *Orans* carefully examined each remaining portion of Article III, "saving as much as possible" in order to "carry[ ] out the will of the people of this State." 206 N.E.2d at 858, 860. The court concluded that only the provisions making election district boundaries "co-terminal" with county borders needed removal, leaving intact other clauses capping the assembly size at 150 members, requiring assembly districts to be "compact * * * convenient and contiguous," allowing the number of senate districts to increase with population growth, and preserving "the historic and traditional significance of counties in the districting process * * * where and as far as possible." *Id.* at 859.

Similarly, in *Schieffelin* v. *Goldsmith*, 170 N.E. 905 (N.Y. 1930), the New York Court of Appeals considered a state statute providing for the appointment of temporary municipal court justices in the event that a sitting justice became unable to perform his duties. The statute gave the mayor authority to appoint temporary replacement justices, but with the proviso that the mayor could choose those replacements only from the membership of the same political party as the justice being replaced. *Id.* at 906. This party affiliation limitation was challenged under Ar-

ticle 13, § 1 of the New York State Constitution, which prohibits any "oath, declaration or other test" (other than the oath of office) as a qualification for holding public office. *Id.* at 908.

The Court of Appeals found that the party affiliation provision could be pruned at the branch without harming the rest of the statute: "It is a complete harmonious statute with that sentence deleted. It affords a complete and definite system for appointing temporary justices. The sentence in question adds nothing to and detracts nothing from the purpose of the act. The provisions of the act are not so interdependent that the act cannot operate without the sentence in question. It is not so related to the other provisions that it can be supposed that the Legislature would not have passed the act without it." *Ibid.*

In so holding, the Court of Appeals distinguished the party affiliation provision in *Schieffelin* from one that tainted the entire statute in *Rathbone* v. *Wirth*, 45 N.E. 15 (N.Y. 1896). There, the Court of Appeals had considered a state statute requiring that the four-member Albany police board be composed of two members from each of the two dominant political parties on the city council. *Id.* at 16-17. The statute thus precluded voters from electing a majority from one of the two major parties, and precluded third-party candidates from running at all. *Id.* The Court of Appeals found these provisions to violate the sections of the New York State Constitution guaranteeing local voters the right to elect local officers of their choosing. *Id.* at 17. It then considered whether the defective provisions concerning the composition of the police board could be severed and the rest of the statute concerning the procedural mechanisms for choosing the police board preserved. *Id.* at 20.

The Court of Appeals performed the familiar severance analysis, asking whether the legislature would have enacted the remainder of the statute had it known the offending provisions were constitutionally defective. The

answer was clearly "No": "This statute was intended to amend the existing law upon the subject of a police commission, and it is perfectly plain, upon its reading, that what was aimed at was to remove from office the present four commissioners and all of their subordinates, * * * and to compel the substitution, as commissioners, of four persons, who would be representatives of two certain political organizations. If we eliminate the prescribed methods for the accomplishment of this purpose, we emasculate the legislative act, and it cannot seriously be contended that then there would remain any such law as was intended to be enacted by the legislature." *Id.* at 21. According to the court in *Schieffelin*, "the statute [in *Rathbone*], read as a whole, made it apparent that its purpose was to change the political construction of the police department, and to strike out that provision would nullify the purpose of the Legislature. The decision is not in conflict with the holding in this case." 170 N.E. at 908.

Read together, *Orans*, *Schieffelin*, and *Rathbone* provide a three-step process for determining severability. Courts must (1) identify the purpose of the statute in which the defective provision is found; (2) strike out only the minimum language needed to remove the constitutional defect; and (3) determine whether the remainder can still function in a manner consistent with the previously identified purpose.

II. The Courts Below Failed To Conduct The Required Severability Analysis, And In So Doing Erred In Eliminating New York's Entire Convention Statute.

The analysis below departs sharply from this well-established framework.

1. To be sure, the Second Circuit correctly recognized that the purpose of the convention statute was to end a ten-year experiment with primaries that the Legislature had deemed a failure. From the first judicial elections in New York in 1846 until 1911, the political parties em-

ployed conventions to designate their Supreme Court nominees. 462 F.3d at 171. In 1911, the Legislature, "buoyed by a wave of progressive politics," switched to a primary system. *Ibid.* The new system soon proved to be problematic: "[O]ver the next decade, concern grew that bare-knuckled primary elections dissuaded qualified candidates from seeking these significant judicial positions. As to those brave enough to enter the contest, observers worried that the need to raise large sums of money might compromise their independence, or at least appear to do so, and lodge effective control of the nominating process in the hands of the political bosses who directed their party's large election apparatus. As a result of these concerns, in 1921 New York recast the electoral process for Supreme Court justices [by enacting the current statute]." *Id.* at 171-172.

In other words, for 150 of the 160 years that New York has elected its Supreme Court Justices, party candidates were chosen by nominating conventions. For the remaining ten years, the State experimented with a primary system much like the one crafted by the district court as a remedy here, but it was deemed to jeopardize the independence of judges due to the large sums of money it required them to raise, and was scrapped.[11] It may be inferred from this legislative history that the purpose of the statute at issue in this case was to create a nomination process that shelters candidates from the need to raise money to finance "bare-knuckled" primary elections.

2. According to the decisions below, the principal defect in the convention statute is the burden created by party rules requiring candidates to field unreasonably large slates of convention delegates. See 462 F.3d at 192; 411 F. Supp. 2d at 220. Under the existing statute, a candidate seeking the office of Supreme Court Justice must

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[11] These concerns were repeated 85 years later in the testimony presented in the district court. See *supra* at 3-4.

field a slate of convention delegates and alternate convention delegates from each assembly district ("AD") within the judicial district he or she seeks to represent. See N.Y. Election Law § 6-124. But the statute leaves to the political parties the task of determining how many delegates must be elected from each AD. *Ibid.*

Using this authority, the political parties have devised delegate-allocation formulas yielding what the courts below found to be unreasonably high numbers of delegates per judicial district. For example, a Democratic candidate running for Supreme Court Justice in the Second Judicial District must field a slate of 124 delegates plus 124 alternate delegates—248 total—across the 24 ADs in that judicial district. Even worse, a Republican candidate running in the Tenth Judicial District must field 185 delegates plus 185 alternate delegates—370 total—across that judicial district's 21 ADs. See 411 F. Supp. 2d at 219.

According to the district court, the statute "make[s] a challenger candidate's effort to elect a majority of delegates more difficult" by "delegating to the major parties the right to determine the number of delegates and alternate delegates" required for nomination. *Id.* at 220. "In the Second Judicial District in 2004, for example, such a challenge would require running approximately 250 candidates across 24 ADs and two counties. The sheer number of people a challenger must recruit to run for the office of delegate and alternate delegate is a significant burden in itself." *Ibid.*

The Second Circuit agreed, concluding that "the evidence showed that the political parties' delegate-allocation formulae do much more than merely dilute the proportional efficacy of votes *vis-a-vis* assembly districts within a judicial district. Rather, the evidence showed that a network of restrictive regulations effectively *excludes* qualified candidates and voters from participating in the primary election and subsequent convention, and thus se-

verely limits voter choice at the general election." 462 F.3d at 192.

The other features of the judicial convention system cited below as contributing to an undue burden have previously been found constitutionally benign when standing alone. For example, this Court has repeatedly upheld more demanding signature requirements for ballot access than those at issue here—between 9,000 and 24,000 signatures over a 37-day period. See *Norman* v. *Reed*, 502 U.S. 279, 295 (1992) ("our precedents foreclose the argument" that collecting 25,000 signatures from one suburban district is unduly burdensome); *Storer* v. *Brown*, 415 U.S. 724, 740 (1974) ("[s]tanding alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden"); *White*, 415 U.S. at 783 (22,000 signatures in 55 days "does not appear either impossible or impractical").

Similarly, although this Court has not considered New York's practice of not including on the primary ballot the names of the candidate to whom a convention delegate has pledged his support, that practice has been sustained by a New York State court. See *Fallon* v. *State Bd. of Elections*, 380 N.Y.S.2d 355 (N.Y. App. Div. 1976).

None of the other features of the convention statute was even claimed to be unconstitutional, much less found to be so. The requirement of a convention in the first instance is clearly permissible under *White*. The election of delegates in a primary and their distribution across all ADs are both features of candidate selection for other offices in New York that were cited with approval by the district court. 411 F. Supp. 2d at 220.

Without the cumulative effect of the delegate-allocation formulas discussed above, it is unlikely that the courts below would have found that the other features of

the convention system significantly burden First Amendment rights.[12]

3. Once the court below concluded that the delegate-allocation formulas could not stand, it was required to strike from the statute the *minimum* language necessary to remove those formulas, and then to ask "whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether." *Alpha Portland Cement*, 129 N.E. at 207.

Striking the defective formulas from the statute here would have been remarkably easy because the formulas are not in the statute to begin with. The statute contains only a grant of authority to the political parties to create those formulas, not the formulas themselves.[13]

If the Legislature did not insist upon *any* particular delegate-allocation formulas in the text of the statute, it follows that the Legislature's intent would not be thwarted by invalidating only the particular allocation formulas chosen by the parties. Furthermore, the fact that the specific formulas were put in place *after* the statute was enacted is compelling evidence of the statute's adequate

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[12] The other factual findings below, detailing the anecdotal difficulties of respondents in seeking office, are more accurately described as symptoms, not causes, of the severe burden discussed above. It is hardly surprising that the political bosses respondent Lopez Torres encountered—one of whom, Clarence Norman, has since been convicted on numerous felony corruption charges—were able to freeze her out of the convention process when her only alternative was to attempt to field a slate of 248 of her own delegates and alternates.

[13] See N.Y. Election Law § 6-124 ("The number of delegates and alternates, if any, shall be determined by party rules"). The creation of the delegate-allocation formulas by the parties is nonetheless "state action" for constitutional purposes. See *Terry* v. *Adams*, 345 U.S. 461, 481-482 (1953); *Smith* v. *Allwright*, 321 U.S. 649, 663-664 (1944).

functionality in the absence of those formulas. Cf. *Skaneateles Waterworks*, 55 N.E. at 566-567. Like the party affiliation requirement in *Schieffelin*, the delegate-allocation formulas "add[ ] nothing to and detract[ ] nothing from the purpose of the act." 170 N.E. at 908.[14]

To extend Judge Cardozo's analogy from *Alpha Portland Cement*, the knife in this case need not have been laid at the branch or at the root, but rather at the poisonous fruit grafted on by the political parties. It was error for the court below to enjoin more than was necessary to cure the constitutional defects it found.

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[14] Even without these logical inferences, the Second Circuit knew what the Legislature "would have wished" because the Legislature told it so in the *amicus* brief it submitted in this case. See Brief of the New York State Legislature as *Amicus Curiae*, *Lopez Torres* v. *New York State Bd. of Elections*, No. 06-0635 (2d Cir. June 2, 2006). The Legislature wanted the federal courts to keep out of crafting state legislation.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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MAY 2007

APPENDIX

APPENDIX

The Mid-Manhattan Branch of the NAACP:

Founded in 1909, the NAACP is the nation's oldest and largest civil rights organization. Its members throughout the United States and the world are the premiere advocates for civil rights in their communities, conducting voter mobilization and monitoring equal opportunity in the public and private sectors. The Mid-Manhattan Branch was founded in 1966.

For over 40 years, the Mid-Manhattan NAACP has been an advocate for all its citizens in the struggle for civil rights and equality. Today, Mid-Manhattan NAACP plays an active role in confronting the gaps and disparities in health care, economics, education funding, criminal justice, and diversity in the courts and the judiciary.

Its efforts continue in voter education, registration and mobilization, as well as youth development and enrichment programs. Today, Mid-Manhattan NAACP has over 600 members, with seven working Committees (Education, Health, Fundraising, Legal Redress, Membership, Political Action and Youth Council).

Mid-Manhattan NAACP's past and present participation on the Supreme and Civil Court Judicial Screening Panels has contributed to greater diversity and minority participation on the Bench. The Branch has five sitting Supreme Court Justices (Hon. Carol L. Edmead, Hon. Milton A. Tingling, Hon. Doris Ling Cohen, Hon. Debra James, and Hon. Paul Fineman) and four sitting Civil Court Judges (Hon. George Silver, Hon. Tanya Kennedy, Hon. Margaret Chan, and Hon. Shari Michels) among its active members. These Judges all reported out of the Judicial Screening Panel process as highly qualified and are representative of the great diversity of New York County.

The Metropolitan Black Bar Association ("MBBA") was created on July 5, 1984 upon the merger of two of the nation's oldest Black bar organizations, the Harlem Lawyers Association and the Bedford Stuyvesant Lawyers Association. For over sixty years, the Harlem Lawyers Association (founded 1921) and the Bedford Stuyvesant Lawyers Association (founded 1933) provided a voice for Black legal professionals and their communities. The MBBA proudly continues the rich legacy of these constituent organizations.

Today, the MBBA is comprised of Black attorneys in both the public and private sectors, as well as judges and other public officials. The MBBA is an affiliate of the National Bar Association and is governed by a 22-member Board of Directors. Its daily operations are managed by its President and six additional elected officers. The purpose of the MBBA is to aid the progress of attorneys of color, and to assist the progress of the legal profession generally. The MBBA serves all of the counties of the Greater New York metropolitan area.

Throughout its 23-year history, MBBA has advocated equal justice and diversity contributing to increasing numbers of minorities in the judiciary. Its founding members include Hon. George Bundy Smith, former Associate Judge on the NYS Court of Appeals; Hon. Fern Fisher, Administrative Judge of the Civil Court of the City of New York; Hon. L. Priscilla Hall, NYS Supreme Court, Kings County; and Hon. Cheryl Chambers, NYS Supreme Court, Kings County.

The MBBA works to expand the breadth and scope of diverse social and legal issues programs for the benefit of the bar and bench as well as the community at large. MBBA has partnered with a number of other organizations to provide such programs, including the Mid-Manhattan Branch of the NAACP, the Asian American Bar Association, the Puerto Rican Bar Association, the Dominican Bar Association, the Jewish Lawyers Guild,

Nigerian Lawyers' Association, New York County Lawyers Association, the Association of the Bar of the City of New York, the American Bar Association, the New York State Bar Association, NAACP Legal Defense Fund, law schools, and other institutions.

The MBBA sponsors lectures and seminars on Tax Amnesty, Haywood Burns Memorial, Affirmative Action, Immigration Law, Attorney Disciplinary Procedures, Criminal Justice, Jury Selection, Entertainment Law, Guardian/Receivership Training, Surrogate Court Practice and Procedure, Labor Law, Estate Planning and other matters. Members may also qualify for scholarships for continuing legal education courses.

Recently, the MBBA called for minority bar associations to jointly screen and interview judicial candidates to increase the strength of diversity. Other initiatives include: In December 2006, the Hon. George Bundy Lecture Series was established to be held annually in conjunction with the Association of the Bar of the City of New York and the Ida B. Wells Barnett Awards is held annually in conjunction with the New York County Lawyers Association and MBBA's expansive CLE program is held in partnership with the ABA and other minority bar groups.

Other activities include programs geared to potential and current law students and mentoring high school students. The Metropolitan Black Bar Association Scholarship Fund, Inc., an independent non-profit corporation, raises funds and grants scholarships to minority law students.

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

—v.—

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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July 13, 2007

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE LOWER COURTS CORRECTLY ADOPTED THE PERSPECTIVE OF A "CHALLENGER CANDIDATE" 5

II. THE LOWER COURTS PROPERLY FOCUSED THEIR SCRUTINY ON THE CONVENTION SYSTEM FOR NOMINATING SUPREME COURT JUSTICES 8

A. Where, As Here, the Nomination Phase of an Electoral Process Effectively Determines the Outcome of the General Election, a Court Properly Subjects That Phase to Scrutiny 8

B. The Lower Courts Correctly Held That the Availability of Alternate Means To Appear on the General Election Ballot Does Not Save the Convention System 12

Page

III. THE SECOND CIRCUIT CORRECTLY APPLIED A "REALISTIC OPPORTUNITY TO PARTICIPATE" STANDARD 18

A. First Amendment Principles Require That Candidates Have a "Realistic Opportunity To Participate" In the Dispositive Stage of the Electoral Process 18

B. The Second Circuit Did Not Interpret a "Realistic Opportunity To Participate" As the Ability To Win the Nomination of a Major Party or To Have Direct Access to Voters 22

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Page(s)

Am. Party of Tex. v. *White*,
415 U.S. 767 (1974) 4, 21

Anderson v. *Celebrezze*,
460 U.S. 780 (1983) ..... *passim*

Buckley v. *Valeo*,
424 U.S. 1 (1976) 6

Bullock v. *Carter*,
405 U.S. 134 (1972) 4, 15, 20

Burdick v. *Takushi*,
504 U.S. 428 (1992) 19

Cal. Democratic Party v. *Jones*,
530 U.S. 567 (2000) 11, 21

Clingman v. *Beaver*,
544 U.S. 581 (2005) 11, 12, 15, 16

Dimick v. *Republican Party of Minn.*,
546 U.S. 1157 (2006) 16

Hadley v. *Junior Coll. Dist. of Metro. Kan. City*,
397 U.S. 50 (1970) 20

J.E.B. v. *Ala. ex rel. T.B.*,
511 U.S. 127 (1994) 22

Jenness v. *Fortson*,
403 U.S. 431 (1971) 5, 22

Page(s)

League of United Latin Am. Citizens v. *Perry*,
126 S. Ct. 2594 (2006) 21

López Torres v. *N.Y. State Bd. of Elections*,
411 F. Supp. 2d 212 (S.D.N.Y. 2006) 2

López Torres v. *N.Y. State Bd. of Elections*,
462 F.3d 161 (2d Cir. 2006) 3

Lubin v. *Panish*,
415 U.S. 709 (1974) 13, 14, 15, 19

Munro v. *Socialist Workers Party*,
479 U.S. 189 (1986) 16, 17

Nixon v. *Condon*,
286 U.S. 73 (1932) 10

Nixon v. *Herndon*,
273 U.S. 536 (1927) 10

Powers v. *Ohio*,
499 U.S. 400 (1991) 22

Randall v. *Sorrell*,
126 S. Ct. 2479 (2006) 3, 6, 7

Regents of the Univ. of Cal. v. *Bakke*,
438 U.S. 265 (1978) 21

Republican Party of Minn. v. *White*,
416 F.3d 738 (8th Cir. 2005) 16

Reynolds v. *Sims*,
377 U.S. 533 (1964) 20

Rogers v. *Lodge*,
458 U.S. 613 (1982) 21

Page(s)

Smith v. *Allwright*,
321 U.S. 649 (1944) 10

Stone v. *Brown*,
415 U.S. 724 (1974) ..... *passim*

Tashjian v. *Republican Party of Conn.*,
479 U.S. 208 (1986) 8

Terry v. *Adams*,
345 U.S. 461 (1953) ..... *passim*

Williams v. *Rhodes*,
393 U.S. 23 (1968) 13, 14, 15, 21

Statutes

42 U.S.C. § 1973 20

N.Y. Election Law § 6-106 3

N.Y. Election Law § 6-124 3

STATEMENT OF INTEREST OF *AMICUS CURIAE*

In 1908, the New York County Lawyers' Association ("NYCLA") was founded on two fundamental principles: the inclusion of all who wish to join and the reform of New York State's legal system. Over the last century, by remaining faithful to these principles, NYCLA has grown into a diverse, not-for-profit, public service association comprising thousands of lawyers, judges and law students.[1]

NYCLA's mission statement articulates, *inter alia*, the following key institutional purposes: promoting the administration of justice and reforms in the law to advance the public interest; advocating for a strong and independent judiciary; encouraging inclusion throughout the legal profession; and maintaining high ethical standards for the bench and bar.

One of the fundamental principles of NYCLA's founding was to ensure that competent, independent jurists sat on New York's bench, without regard to party affiliation. NYCLA's founders were a mix of democrats and republicans who opposed many of the individuals whom Tammany Hall attempted to seat as judges. Since its inception, NYCLA has continuously led the effort to strengthen and maintain the independence of New York State's judiciary.

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all amicus briefs. Written consent from the remaining parties has been filed with the Court along with this brief. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of this brief.

Toward that end, throughout its history, NYCLA has directed significant attention to the nomination process for New York State Supreme Court Justices, which is the subject of this appeal. NYCLA is dedicated to creating the best judicial selection system possible and has consistently urged the reform of the existing convention system. In September 2003, NYCLA empanelled a special Judicial Selection Task Force to evaluate all aspects of the judicial selection process. The Task Force, which issued a report in May 2006, continues its work today. NYCLA remains committed to the realization of a transparent and democratic judicial selection process.

While NYCLA prefers a merit-based appointment system for selecting New York Supreme Court Justices, it is imperative that the current, unconstitutional convention system for selecting Supreme Court Justices not be permitted to continue. The convention system is neither democratic, nor transparent. NYCLA therefore urges this Court to affirm the judgment of the United States Court of Appeals for the Second Circuit so that public confidence in the judiciary, which is a cornerstone of a free society, can be restored.

SUMMARY OF ARGUMENT

By decision dated January 27, 2006, the United States District Court for the Eastern District of New York (Gleeson, J.) found that respondents had demonstrated a clear likelihood of successfully proving that the existing convention system for nominating candidates for election to the New York State Supreme Court violates the First Amendment. *López Torres* v. *N.Y. State Bd. of Elections*, 411 F. Supp. 2d 212 (S.D.N.Y. 2006). Accordingly, the district court preliminarily enjoined implementation of provisions governing the convention system, codified as

Sections 6-106 and 6-124 of the New York Election Law. Pet. App. 185[2]; N.Y. Election Law §§ 6-106, 6-124.

The Second Circuit affirmed. *López Torres* v. *N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006). This brief focuses on three key, and correctly decided, aspects of that decision.

1. The Second Circuit found that the "District Court correctly adopted the perspective of a candidate who has at least some measure of popular support but lacks the support of party leadership, and has no other means of overcoming the burdens imposed by the electoral scheme." Pet. App. 61. Petitioners' criticism of this "challenger candidate" viewpoint is unfounded. As the Second Circuit noted, this perspective "derives directly from applicable case law" of this Court, in particular, *Storer* v. *Brown*, 415 U.S. 724, 742 (1974). Pet. App. 60. Indeed, the Court's recent decision in *Randall* v. *Sorrell* struck down Vermont's contribution limits on First Amendment grounds based in part on their harmful effects on challengers. 126 S. Ct. 2479, 2496 (2006) (plurality opinion) ("[T]he critical question concerns . . . the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*."). The Second Circuit appropriately considered the burdens imposed by New York's judicial nominating convention system from the perspective of a challenger candidate.

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[2] We refer to the Appendix to the Petition for Certiorari as "Pet. App." We refer to the brief of the New York County Democratic Committee *et al.* as the "County Br."; and that of the New York State Board of Elections as the "BOE Br."

2. Based on its finding that "because one-party rule is the norm in most judicial districts, the general election is little more than ceremony," Pet. App. 23, the Second Circuit correctly focused its scrutiny on the convention system for nominating Supreme Court Justices. This Court has instructed that where the nominating phase of an electoral system is outcome determinative, the nominating phase itself – rather than the general election – is the proper focus of scrutiny. *Terry* v. *Adams*, 345 U.S. 461, 469 (1953) (Black, J., announcing judgment of the Court, joined by Douglas and Burton, J.J.) (striking down primary system after finding it was "the only effective part[] of the elective process"). In such cases, the availability of alternate means of access to the general election ballot will not save an unconstitutional primary scheme. *Bullock* v. *Carter*, 405 U.S. 134, 146-147 (1972) (striking down primary election filing fee where "the primary election may be more crucial than the general election," and an alternative candidacy in the general election "requires candidates and voters to abandon their party affiliations").

3. Focusing on the nominating phase of the Supreme Court elections, the Second Circuit found that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest." Pet. App. 41-42. Petitioners criticize this standard as unsupported by this Court's decisions and as granting a "right to *win* a party nomination outright or the right to have direct access to voters." County Br. at 25, 28. These complaints do not withstand scrutiny. The right to a "realistic opportunity to participate" is well-grounded in this Court's decisions holding that First Amendment "access to the electorate" must "be real, not 'merely theoretical.'" *Am. Party of Tex.* v.

White, 415 U.S. 767, 783 (1974) (quoting *Jenness* v. *Fortson*, 403 U.S. 431, 439 (1971)). And as these decisions demonstrate, a "realistic" right to participate is not a right to win, nor does it grant candidates a right to direct voter access.

The Second Circuit's judgment therefore should be affirmed.

ARGUMENT

I. THE LOWER COURTS CORRECTLY ADOPTED THE PERSPECTIVE OF A "CHALLENGER CANDIDATE."

In evaluating the severity of the burdens imposed on voters' and candidates' First Amendment associational rights, the district court and the Second Circuit adopted the perspective of "a reasonably diligent candidate who lacks the support of a massive apparatus controlled by party leadership." Pet. App. 160 (internal quotation marks and alteration omitted); Pet App. 61. The district court then asked whether such a reasonably diligent challenger could either (1) get her own delegates and alternates on the ballot in each Assembly District; or (2) lobby the delegates installed by the party leaders. Pet. App. 167. It found that neither avenue was open to challenger candidates and that, therefore, "the burdens on candidates and voters under New York's convention system are severe." Pet. App. 169. The Second Circuit agreed. Pet. App. 45-46, 61-70.

As the Second Circuit recognized, the district court's definition of a challenger candidate "derives directly from applicable case law." Pet. App. 60 (citing *Storer* v. *Brown*, 415 U.S. 724, 742 (1974)). In *Storer*, this Court assessed the burdens imposed by signature requirements from the perspective of a "reasonably diligent independent

candidate," asking whether such a candidate could "be expected to satisfy the signature requirements." 415 U.S. at 742. Applying that inquiry to this case resulted in the two questions identified above – whether a reasonably diligent challenger had an opportunity to run slates of pledged delegates or could lobby party-appointed delegates. Pet. App. 167.

Petitioners incorrectly suggest that *Storer* and other "ballot access cases" mean that First Amendment rights are implicated only when "the election schemes at issue were designed to '*freeze out*' minor party candidates and non-party, independent candidates from the political process." County Br. 25. Yet this Court's First Amendment jurisprudence is not so narrowly confined. In *Buckley* v. *Valeo*, 424 U.S. 1, 32 (1976), for example, this Court evaluated the effect of campaign contribution limits on "major-party challengers to incumbents." The Court upheld these limits in part on the ground that there was "no . . . evidence to support the claim that the contribution limits in themselves discriminate against" such challenger candidates. *Id.*

Moreover, since the Second Circuit rendered its decision in this case, this Court again has recognized that restrictions on candidates' First Amendment rights should be viewed through the lens of the challenger candidate. In *Randall* v. *Sorrell*, 126 S. Ct. 2479 (2006), the Court struck down contribution limits applicable to candidates for Vermont state office on First Amendment grounds. In doing so, the plurality opinion focused on the effects of the contribution limits on *challengers* seeking to unseat *incumbents*. It found that the evidence suggested that contribution limits would "significantly restrict the amount of funding available for challengers to run competitive

campaigns," *id.* at 2495, and concluded that the limits were unconstitutional in part because "the Act burdens First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers." *Id.* at 2499.

With its focus placed squarely on the challenger candidate, the *Randall* plurality considered evidence about the *average* effect of contribution limits to be beside the point. The plurality opinion states that "the critical question concerns not simply the *average* effect of contribution limits on fundraising but, more importantly, the ability of a candidate running against an incumbent officeholder to mount an effective *challenge*." *Id.* at 2496. Justice Souter's dissenting opinion also recognized the relevance of the challenger perspective, noting that the constitutionality of the contribution limits should be evaluated in part based on "evidence that these low limits are fair to challengers." *Id.* at 2514 (Souter, J., dissenting, joined by Ginsburg and Stevens, JJ.).

To be sure, the analogy between a challenger candidate seeking to displace a party-supported candidate in an intra-party contest and a challenger seeking to defeat an elected incumbent is not perfect. But there are important similarities. The *Randall* plurality opinion makes clear that electoral requirements that "prevent[] challengers from mounting effective campaigns against incumbent officeholders" can "harm the electoral process" and "reduce[] democratic accountability." 126 S. Ct. at 2492. These same harms can result where, as here, the evidence demonstrates that challengers have no chance of mounting effective campaigns against party-backed candidates.

II. THE LOWER COURTS PROPERLY FOCUSED THEIR SCRUTINY ON THE CONVENTION SYSTEM FOR NOMINATING SUPREME COURT JUSTICES.

Apart from the convention system, independent candidates can gain a spot on the general election ballot for Supreme Court Justice, *inter alia*, by submitting a petition with 3,500 or 4,000 valid signatures. BOE Br. at 6; County Br. at 7. Petitioners argue that this other route to the *general election ballot* renders New York's nominating convention system constitutional, because "reasonable access to a general election ballot . . . is all that the First Amendment requires the State to provide." BOE Br. at 17. This is not correct. Given the substantial – indeed determinative – effect that the convention system has on the ultimate outcome of elections for Supreme Court Justice in New York, the lower courts properly subjected the convention system itself to First Amendment scrutiny.

A. Where, As Here, the Nomination Phase of an Electoral Process Effectively Determines the Outcome of the General Election, a Court Properly Subjects That Phase to Scrutiny.

Courts apply a careful balancing test when evaluating the constitutionality of an electoral system. As this Court has instructed, in "pass[ing] on constitutional challenges to specific provisions of election laws . . . no litmus paper test . . . separat[es] those restrictions that are valid from those that are invidious . . . . The rule is not self-executing and is no substitute for the hard judgments that must be made." *Storer* v. *Brown*, 415 U.S. 724, 730 (1974); *see also Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 213-14 (1986) (setting forth balancing test).

In New York State, the system for electing Supreme Court Justices has two phases: a nominating convention for major parties, followed by a general election. The lower courts correctly found that, of these two phases, the convention always or almost always determines who ultimately will be elected a Supreme Court Justice. Pet. App. 129-132; Pet. App. 40-41, 45. In particular, the district court found that (i) in four out of twelve judicial districts "the Democratic Party nominees are always elected," (ii) in four other judicial districts "the Republican nominees are always elected" or "they usually are," and (iii) "[i]n districts that are not dominated by a single party, the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." Pet. App. 129-30. It also concluded that "candidates without either the Democratic or Republican nomination" – *i.e.*, candidates other than those selected by nominating convention – "have no chance of being elected anywhere." Pet. App. 130-31. Likewise, the Second Circuit found that "New York's nominating process . . . deprives a candidate of access altogether," and that "because one-party rule is the norm in most judicial districts, the general election is little more than ceremony." Pet. App. 45, 23; *see also* Pet. App. at 69-70 ("[T]hrough a byzantine and onerous network of nominating phase regulations employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment.").

Petitioners' only response to these factual findings concerning one-party rule is that they "cannot be taken seriously" because the two most recent mayors of New York City have been Republicans and because two upstate New York Republicans lost congressional seats to Democrats in the 2006 elections. BOE Br. at 25. These arguments do not address the district court's finding that the parties "divvy up"

judgeships in competitive areas. Pet. App. 130. And of course, neither New York City mayoral candidates nor congressional candidates are subjected to New York's judicial nominating conventions. In any event, such non-record evidence provides no basis for finding clear error in the factual findings made below.

Where, as here, the nominating phase of an electoral system is outcome determinative, this Court has instructed that the nominating phase – rather than the general election – is the proper focus of scrutiny. In *Terry* v. *Adams*, the last of the so-called "White Primary" cases,[3] this Court struck down a primary system (known as the "Jaybird primary") after finding that it was always determinative of the general election. The Court explained its reasoning as follows:

> The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds . . . . The Democratic primary and the general election have become no more than perfunctory ratifiers of the choice that has already been made in Jaybird elections . . . . The Jaybird primary has become an integral part, indeed

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[3] There are four "White Primary" cases in which this Court struck down election restrictions that excluded non-white voters: *Nixon* v. *Herndon*, 273 U.S. 536 (1927); *Nixon* v. *Condon*, 286 U.S. 73 (1932); *Smith* v. *Allwright*, 321 U.S. 649 (1944); and *Terry* v. *Adams*, 345 U.S. 461 (1953). Although this Court found that these restrictions violated the Fifteenth Amendment, the holdings are relevant here because in each case the Court focused on the *nominating phase* (as opposed to the general election) to find that the entire election process was unconstitutional. That is precisely what the lower courts did in this case.

> the only effective part, of the elective process that determines who shall rule and govern in the county.

Terry v. *Adams*, 345 U.S. 461, 469 (1953) (Black, J., announcing judgment of the Court, joined by Douglas and Burton, J.J.).[4]

As Justice Stevens summarized more recently (dissenting in *Clingman* v. *Beaver*):

> If the so-called "white primary" cases make anything clear, it is that the denial of the right to vote cannot be cured by the ability to participate in a subsequent or different election. Just as the "only election that has counted" in *Terry*, 345 U.S. at 469, was the Jaybird primary, since it was there that the public official was selected in any meaningful sense, the only primary that counts here is the one in which the candidate respondents want to vote for is actually running.

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[4] Petitioners argue that *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000), rejected the idea that *Terry* created a "'First Amendment associational interest' to be included in 'a state-required, state-financed primary election.'" BOE Br. at 21 (quoting *Jones*, 530 U.S. at 573 n.5). In fact, the footnote cited by petitioners held that under *Terry*, parties retain the right to exclude individuals from voting in their primary elections, so long as these exclusions do not "violate[] some independent constitutional proscription." *Jones*, 530 U.S. at 573 n.5. Here, New York's judicial nominating convention system is unconstitutional under *Terry* because it excludes and burdens candidates and voters in violation of the First Amendment.

Clingman v. *Beaver*, 544 U.S. 581, 611 (2005) (Stevens, J., dissenting, joined by Ginsburg and Souter, J.J.) (parallel citations omitted).

Like the Jaybird primary in *Terry*, the convention system used to select Supreme Court Justices in New York is "the only election that . . . count[s]." 345 U.S. at 469. The lower courts thus properly focused their scrutiny on the convention system, as opposed to the general election.

B. The Lower Courts Correctly Held That the Availability of Alternate Means To Appear on the General Election Ballot Does Not Save the Convention System.

In an effort to deflect attention from the constitutional infirmities of the convention system, petitioners argue that the district court erred by failing to account for the fact that there are alternative means of "reasonable access" to the general election ballot in New York. BOE Br. at 17. In support of this argument, petitioners rely on a series of decisions by this Court that addressed laws limiting the ability of independent and minor-party candidates to appear on general election ballots. BOE Br. at 22-24. These cases do not provide any basis for overturning the Second Circuit's decision.

First, as the district court found, this case is not about the rights of a candidate seeking "to access the general election ballot as an independent." Pet. App. 161. Rather, it concerns the ability of candidates "to compete for their major party's nomination for Supreme Court Justice by garnering support among the rank-and-file members," Pet. App. 161 – an impossibility for challenger candidates who must disaffiliate from their parties and compete only in the general election in order to seek judicial office.

Second, the cases on which petitioners rely do not support the proposition that access to the general election ballot immunizes other stages of the electoral process from scrutiny. These cases address the constitutionality of limitations on candidate access to the primary or general election ballot. But none of them involved convention systems or primaries that were found to be outcome determinative, and in the one case where a ballot restriction was upheld, no candidate was required to disaffiliate from his or her party in order to participate in the general election. By contrast, the Second Circuit noted here that "the general election is little more than ceremony," Pet. App. 23, and the district court observed that "nominations, not general elections, are the critical determinant in electing Supreme Court Justices in New York." Pet. App. at 166. And, in this case, in order to be listed on the general election ballot, a challenger candidate would have to give up his or her party affiliation. Pet. App. 55. These striking factual differences significantly undercut petitioners' reliance on the cited Supreme Court cases.

Petitioners cite three cases in which this Court struck down limitations on ballot access. BOE Br. at 22 (citing *Lubin* v. *Panish*, 415 U.S. 709 (1974); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); and *Williams* v. *Rhodes*, 393 U.S. 23 (1968)). In each of them, the Court remarked that the electoral scheme at issue provided no alternate means of access to the general election ballot. In *Lubin*, the Court struck down a California filing fee requirement applicable to both the primary and general election that afforded no "reasonable alternative means of ballot access" to indigent candidates. 415 U.S. at 718. In *Anderson*, the Court found an early filing deadline unconstitutional, where the deadline would "totally exclude" from the general election ballot certain independent candidates. *Anderson*,

460 U.S. at 792. And in *Williams*, the Court struck down restrictions that made it "virtually impossible" for any but the two major parties to appear on Ohio's presidential ballot. *Williams*, 393 U.S. at 25.

These cases hold that an electoral scheme is unconstitutional if a state imposes burdensome limitations on general election ballot access and does not offer reasonable alternate means of access. The converse does not logically follow, however, that if reasonable alternative means to access a general election ballot exist, then access restrictions upon the party nomination process are *per se* constitutional. Indeed, in *Anderson* and *Williams*, only general election restrictions were at issue, and the Court therefore had no occasion to consider whether the existence of an exclusive, outcome-determinative phase of the electoral process prior to the general election would have equally rendered their schemes unconstitutional. In contrast, in *Lubin*, where indigent candidates were unable to pay the filing fee and the primary was an exclusive and outcome-determinative phase as to them, the Court found the scheme unconstitutional. 415 U.S. at 718.

Moreover, reasonable alternative means of access to the general election ballot are not available in this case. New York's system affords a challenger candidate no practical access to the judicial election process. New York's nominating conventions are much more outcome-determinative than the filing fees at issue in *Lubin*. Not only do they determine whether a challenger candidate will have any access to the election at all; they also decide the final winners. As the district court found, the Democratic and Republican parties appoint their respective justices in safe Assembly Districts and "divvy up the judgeships" in mixed ones, so that the candidate that is selected by a particular

party's convention is assured of victory at the general election. Pet. App. at 130. And as the Second Circuit found, "through the use of overlapping and severe burdens, [the convention system] deprives a candidate of access altogether." Pet. App. 45. Like the filing fee in *Lubin*, the deadline in *Anderson*, and the restrictions in *Williams*, New York's system completely excludes challenger candidates from the nominating convention phase of the elective process – and therefore the entire elective process – without providing "reasonable alternative means" of access. *Lubin*, 415 U.S. at 718. Indeed, as in *Williams*, where the major parties had a "permanent monopoly" on the general election ballot, 393 U.S. at 32, the district court here found that "candidates without either the Democratic or Republican nomination have no chance of being elected anywhere." Pet. App. 130-31. The lower courts thus properly found that the alternative means of appearing on the general election ballot in New York did not excuse the flaws in the convention system.

Furthermore, it is not reasonable access to require challenger candidates to disaffiliate from their parties in order to participate in the judicial election process. In *Bullock* v. *Carter*, in considering a primary election filing fee, this Court held that access to the general election that required candidates to disaffiliate from their parties offered no "reasonable alternative means of access to the ballot." 405 U.S. 134, 149 (1972); *id.* at 146-47 ("[W]e can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations.").

Citing *Clingman* v. *Beaver*, 544 U.S. 581 (2005), petitioners argue that such a disaffiliation requirement does not substantially burden associational rights. BOE Br. at 24. *Clingman* is inapposite. There, the Court considered

whether requiring voters to register as Libertarians or Independents in order to vote in the Libertarian primary violated voters' (and the Libertarian Party's) associational rights. *Clingman*, 544 U.S. at 584-85. The Court held that the statute minimally burdened voters' rights to associate with the Libertarian party – without addressing whether it burdened voters' right to associate with their original political party. *Id.* at 590-91 (plurality opinion).[5] The latter issue was apparently not raised and was not before the Court. The other cases cited by petitioners address nonpartisan primaries, which do not require a candidate to disaffiliate from his or her party and are thus irrelevant to evaluating the burdensomeness of disaffiliation. BOE Br. at 24 (citing *Republican Party of Minn.* v. *White*, 416 F.3d 738, 779 (8th Cir. 2005) (Gibson, J., dissenting), *cert. denied sub nom. Dimick* v. *Republican Party of Minn.*, 546 U.S. 1157 (2006); *Storer*, 415 U.S. at 741).

Petitioners also cite *Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986) (cited in BOE Br. at 23), in which this Court upheld a Washington law conditioning access to the general election ballot on receiving one percent of the vote in an easily accessible multi-party "blanket

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[5] Petitioners mischaracterize *Clingman* in this regard, stating that it "held that a requirement that one disaffiliate from his current party 'prior to participating in [another] party's primary minimally burdens voters' associational rights.'" BOE Br. at 24. In fact, *Clingman* held that "requiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights." 544 U.S. at 592. Read in context, *Clingman* clearly referred to the burden on a voter's right to associate with the party holding the primary, rather than on a voter's right to associate with his or her current party, if any.

primary." 479 U.S. at 191-92. Petitioners point to the Court's finding that Washington guaranteed "candidate access to a statewide ballot" at the primary stage, *id.* at 199, arguing that statewide access at any stage of an election should preserve it from First Amendment challenge. BOE Br. at 23-24. As the Second Circuit noted, however, this Court found *Munro's* ballot access provision constitutional not because of the existence of alternate means of access, but under the principle "that States may condition access to the general election ballot . . . upon a showing of a modicum of support." 479 U.S. at 193. Moreover, as discussed above, access afforded after the outcome-determinative phase of an election – in this case, access to the general election after the nominating conventions have already picked the winners – is no access at all. In *Munro*, candidates had "easy access to the primary election ballot" itself; there was no outcome-determinative phase of the election prior to the blanket primary. *Id.* at 199.

The lower courts properly considered the burdens imposed on those who seek a major party nomination to be a Supreme Court Justice in New York. The Second Circuit concluded that "through a byzantine and onerous network of nominating phase regulations employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment." Pet. App. 69-70. The district court found that the only way to become a Supreme Court Justice in New York is through the convention system established by statute. Pet. App. 130-31. The lower courts did not ignore the supposed alternative means by which a candidate can access the general election ballot in New York – they instead found that these alternative means have absolutely no effect on the outcome of the general election. Under these circumstances, the Second Circuit did not err in subjecting the convention system to scrutiny, notwithstanding the

availability of alternative means by which a candidate can appear on the general election ballot.

III. THE SECOND CIRCUIT CORRECTLY APPLIED A "REALISTIC OPPORTUNITY TO PARTICIPATE" STANDARD.

In evaluating the constitutionality of the convention system used to select New York Supreme Court Justices, the Second Circuit found that "candidates and voters" have a First Amendment right to "a realistic opportunity to participate in the nominating process." Pet. App. 41. Petitioners argue that this was a "revolutionary conclusion" supported by "no pertinent authority whatsoever," BOE Br. at 17, and it created a "right to *win* a party nomination outright or the right to have direct access to voters." County Br. at 28. As explained below, the Second Circuit did not err in applying a standard based on a "realistic opportunity to participate." Nor did it create a "right to *win*" or to "direct access."

A. First Amendment Principles Require That Candidates Have a "Realistic Opportunity To Participate" In the Dispositive Stage of the Electoral Process.

The Second Circuit correctly found that New York State's judicial districts are subject to "one-party rule" and a series of regulations that "has transformed a de jure election" for Supreme Court Justices "into a de facto appointment." Pet. App. 69-70. This *de facto* appointment system violates candidates' and voters' First Amendment right to "a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest." Pet. App. 41-42. In other words, "the First Amendment prohibits a state from

maintaining an electoral scheme that in practice excludes candidates, and thus voters, from participating in the electoral process, unless the exclusionary regulations are necessary to further a compelling state interest." Pet. App. 44.

This right to a "realistic" opportunity to participate is well-grounded in this Court's jurisprudence. The First Amendment unquestionably protects the associational rights of voters and candidates, which include the right of voters to have "candidates of their choice placed on the ballot," *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992), as well as the correlative right of candidates "to a place on a ballot," *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974); *see also id.* (recognizing an "individual candidate's . . . important interest in the continued availability of political opportunity"); *Anderson* v. *Celebrezze*, 460 U.S. 780, 786 (1983) ("The impact of candidate eligibility requirements on voters implicates basic constitutional rights."). Petitioners concede that candidates have "the right to access the electoral system instituted by the state" but assert that this right is fully satisfied if a candidate has "*convention access*, *i.e.*, . . . a chance to put one's name up for consideration at the convention." County Br. at 31. There are several problems with petitioners' position.

First, by asserting that the right to access is satisfied if a candidate can be considered at a convention, petitioners seem to suggest that unrealistic participation is enough to satisfy the First Amendment. The Second Circuit found that "regulations effectively prohibit candidates who lack the support of the party leadership from putting their slates of delegates on the primary election ballot," and "a candidate who lacks the support of her party's leadership has no actual opportunity to lobby delegates." Pet. App. 16, 18. In other

words, New York's judicial nominating convention system effectively "preclude[s]" a candidate without party support from seeking his or her party's nomination. Pet. App. 70. If this system violates candidates' and voters' First Amendment rights, the ability to engage in a pointless exercise by "put[ting] one's name up for consideration at the convention," County Br. at 31, without any chance of success, cannot cure that violation. A right to unrealistic access cannot be the law. Indeed, this Court has held that "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock* v. *Carter*, 405 U.S. 134, 143 (1972).

Second, petitioners incorrectly assert that there is "no pertinent authority whatsoever" for the "realistic opportunity to participate" standard. BOE Br. at 17. In fact, the "opportunity to participate" standard is a staple of voting rights law. In *Hadley* v. *Junior College Dist. of Metropolitan Kansas City*, this Court held that the Constitution "requires that each qualified voter must be given an equal opportunity to participate in that election." 397 U.S. 50, 56 (1970). In *Reynolds* v. *Sims*, the Court held that "each and every citizen has an inalienable right to full and effective participation in the political processes" of his or her state. 377 U.S. 533, 565 (1964); *id.* at 566 ("[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."). And there can be no question that courts are well versed in interpreting the "opportunity to participate" standard. Besides being enshrined in the law of this Court, it is set forth in Section 2 of the Voting Rights Act, which guarantees minority groups an equal "opportunity . . . to participate in the political process." 42 U.S.C. § 1973(b);

League of United Latin Am. Citizens v. *Perry*, 126 S. Ct. 2594, 2619 (2006) (applying Section 2).

Other voting cases have applied standards substantively similar to the "realistic opportunity to participate" standard. In *Terry* v. *Adams*, Justice Frankfurter condemned the exclusion of minority voters "from meaningful participation in the only primary scheme set up by the State." 345 U.S. 461, 476 (1953) (Frankfurter, J., concurring). In *Anderson* v. *Celebrezze*, this Court evaluated "ballot access restrictions" in light of the burdens that they place on the rights of voters "'to cast their votes effectively.'" 460 U.S. at 787 (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968)). And in *Regents of the University of California* v. *Bakke*, the Court stated that the "relevant opportunity" at issue in its prior election cases encompassed the opportunity for "meaningful participation in the electoral process." 438 U.S. 265, 305 (1978) (Powell, J., announcing judgment of the Court); *see also Rogers* v. *Lodge*, 458 U.S. 613, 640 n.21 (1982) (Stevens, J. dissenting) (stating that "meaningful participation" in the electoral process is a hallmark of representative democracy); *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 573 n.5 (2000) ("If the 'fundamental right' to cast a meaningful vote were really at issue," the challenged statute "would be not only constitutionally permissible but constitutionally required.").

That this Court has embraced the concept of realistic participation is not surprising given that it has long recognized that First Amendment "access to the electorate" must "be real, not 'merely theoretical.'" *Am. Party of Tex.* v.

White, 415 U.S. 767, 783 (1974) (citing *Jenness* v. *Fortson*, 403 U.S. 431, 439 (1971)).[6] The Second Circuit's application of a realistic participation standard is thus well supported by this Court's precedents.

B. The Second Circuit Did Not Interpret a "Realistic Opportunity To Participate" As the Ability To Win the Nomination of a Major Party or To Have Direct Access to Voters.

The Second Circuit found that the burdens imposed on respondents were severe because (i) at the delegate selection stage, candidates lacking party support can "never" satisfy the requirements for running their own slates of delegates; and (ii) at the convention stage, such candidates have a "non-existent" chance to lobby delegates. Pet. App. 45. Petitioners argue that by requiring them to alleviate one of these two burdens (each of which incorporates a combination of multiple burdens), the Second Circuit granted candidates a "right to *win* a party nomination outright or the right to have direct access to voters." County Br. at 28. According to petitioners, "*successful* lobbying of delegates at the convention stage[] amounts to winning the nomination, not merely competing for it." County Br. at 30.

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[6] This Court has also endorsed the concept of an opportunity to participate in other contexts. *See, e.g., J.E.B.* v. *Ala. ex rel. T.B.*, 511 U.S. 127, 145 (1994) (holding gender-based peremptory challenges unconstitutional and remarking that "[e]qual opportunity to participate in the fair administration of justice is fundamental to our democratic system"); *Powers* v. *Ohio*, 499 U.S. 400, 409 (1991) (holding race-based petit jury peremptory challenges unconstitutional because they foreclose "a significant opportunity to participate in civic life").

And "finding that candidates must have a right to run pledged delegates amounts to a judicial declaration that the only nomination method that satisfies the First Amendment is a primary or its functional equivalent." County Br. at 29.

The Second Circuit never held that a right to "successful" lobbying exists.[7] Instead, it found that respondents' rights were severely burdened because, among other reasons, challenger candidates have "no actual opportunity to lobby delegates." Pet. App. 18; Pet. App. 122 ("[L]obbying judicial convention delegates and alternates is not a realistic route to a nomination even for diligent candidates if they lack the support of party leaders."). As the district court found, the less than three-week time period for lobbying was "deliberately kept short," thereby making it impossible for challenger candidates to lobby delegates. Pet. App. 169. All that is required to alleviate the specific burden imposed by candidates' inability to lobby delegates is a system in which there is time to lobby delegates, and

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[7] Petitioners' claim that the courts guaranteed a right to "successful lobbying" comes from an out-of-context phrase in the district court opinion. Applying the *Storer* test, the district court evaluated the burdensomeness of the judicial nominating convention system by asking whether a challenger candidate could "succeed in getting her own delegates and alternates on the ballot in each Assembly District" or could "succeed in lobbying the delegates installed by the party leaders." Pet. App. 167. The second question clearly was intended to ask whether a challenger candidate had any practical chance to lobby delegates; the district court struck down the convention system after concluding that it gave challenger candidates "virtually no chance of obtaining a major party nomination." Pet. App. 169. In any event, the Second Circuit did not adopt this aspect of the district court's formulation of the burdens imposed by the judicial nominating convention system.

delegates are not beholden to party leaders. This is not a right to win.

Nor did the Second Circuit hold that all convention systems are unconstitutional and must be replaced by systems affording direct candidate access to voters. County Br. at 29. Rather, the Second Circuit held that *this* convention system unconstitutionally burdens the First Amendment rights of candidates and voters because it "preclude[s] all but candidates favored by party leadership" from seeking a party's nomination. Pet. App. 70.

CONCLUSION

The judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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19

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF FORMER NEW YORK STATE JUDGES AND THE AMERICAN JUDICATURE SOCIETY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

IDENTITY AND INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. PUBLIC CONFIDENCE IN THE JUDICIARY IS A CORNERSTONE OF OUR GOVERNMENTAL FRAMEWORK 7

II. NEW YORK'S CONVENTION-BASED SYSTEM FOR SELECTING SUPREME COURT JUSTICES UNDERMINES PUBLIC CONFIDENCE IN THE JUDICIARY 9

A. The Public Perception Is that Political Party Leaders, Rather than Voters, Actually Choose Judicial Nominees. 9

B. The Convention Selection Process Is Not Transparent and Provides No Meaningful Assurance of Electoral Participation. 10

III. THE STATE MAY NOT CREATE AND ENFORCE A JUDICIAL-SELECTION SYSTEM THAT UNDERMINES THE FACT AND THE APPEARANCE OF AN INDEPENDENT AND IMPARTIAL JUDICIARY. 12

IV. THE CONVENTION SYSTEM IS NOT NARROWLY TAILORED TO ACHIEVE STATE INTERESTS; ALTERNATIVES EXIST THAT WOULD NOT BURDEN CONSTITUTIONAL RIGHTS OR UNDERMINE CONFIDENCE IN THE JUDICIARY 15

A. Petitioners' Criticisms of Judicial Primaries Do Not Bolster the Current System. 16

B. Within the Framework of the New York Constitution, There Are Reforms Available to the Legislature to Ensure Judicial Independence, While Addressing the Other Concerns That Have Been Raised. 18

1. Public Financing of Judicial Elections Would Preserve Judicial Independence and Public Confidence. 19

2. Retention Elections Would Preserve Independence for Incumbent Justices. 21

3. Education and Screening Would Address Fears that Voters Would Elect Unqualified Justices. 22

C. Over the Longer Term, the State Has Additional Options to Ensure Judicial Independence While Addressing Other Concerns. 24

1. Smaller Judicial Districts Would Achieve Geographic, Racial, and Ethnic Diversity, and Would Reduce the Cost of Campaigns. 24

2. An Appointment System with Sufficient Safeguards Could Be Used to Promote Judicial Independence and Quality. 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases

Brown v. Hartlage,
456 U.S. 45 (1982) 8, 13

Buckley v. Ill. Judicial Inquiry Bd.,
997 F.2d 224 (7th Cir. 1993) 13, 14

Buckley v. Valeo,
424 U.S. 1, 27 (1976) 8

In re Bybee,
716 N.E.2d 957 (Ind. 1999) 14

In re Duckman,
699 N.E.2d 872 (N.Y. 1998) 7

Hurowitz v. Bd. of Elections,
426 N.E.2d 746 (N.Y. 1981) 8

Mistretta v. United States,
488 U.S. 361 (1989) 4, 7

Nicholson v. State Comm'n on Judicial Conduct,
409 N.E.2d 818 (N.Y. 1980) 4, 8

In re Raab,
793 N.E.2d 1287 (N.Y. 2003) 7, 8, 14

Republican Party v. White,
536 U.S. 765 (2002) 7, 13, 15

Republican Party v. White, 416 F.3d 738 (8th Cir. 2005) (en banc), *cert. denied sub nom. Dimick v. Republican Party*, 126 S. Ct. 1165 (2006) 14

In re Watson,
794 N.E.2d 1 (N.Y. 2003) 8, 13

Constitutional Provisions, Statutes, and Regulations

N.Y. CONST. art. VI, § 2 23

N.Y. CONST. art. VI, § 6 ..... 12, 24, 26

N.Y. Elec. Law § 6-168 17

N.Y. Comp. Codes R. & Regs., tit. 22, § 100.5 11

N.Y. COMP. CODES R. & REGS., tit. 22, § 150.0 *et seq* 23

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Hon. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY.L.A.L. REV. 1429 (2001).....21

Judith S. Kaye, *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 ALB. L. REV. 961 (1994)..... 25

Hon. Jonathan Lippman, The Public Policy Forum: Court Reform in New York State (May 17, 2005).....22

IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The *amici curiae* are a select group of individual former New York State judges (trial, appellate, and administrative) who have extensive knowledge of the workings of the New York court system, as well as the American Judicature Society, a national organization of jurists, attorneys, and lay people committed to judicial excellence. The *amici* share a concern that New York's current selection system for selecting Supreme Court Justices threatens public confidence in the integrity and independence of the state judiciary. The background and experience of the *amici*, reflected in the brief summaries below, collectively demonstrate their broad knowledge of and interest in the issues implicated by this case.

Hon. Richard J. Bartlett served as a Justice of the New York State Supreme Court beginning in 1973. He was appointed as the first Chief Administrative Judge of the State of New York in 1974 and served until 1979. In addition, he served as the Dean of Albany Law School from 1979 to 1986. Prior to his judicial service, Judge Bartlett was elected to the State Assembly, where he led his party as Minority Whip. In 2003, Chief Judge Judith S. Kaye formed the New York State Commission to Promote Public Confidence in Judicial Elections (the Feerick Commission) and appointed Judge Bartlett as a member.

Hon. Joseph W. Bellacosa served as Chief Administrator and Chief Administrative Judge of the New York State

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[1] The parties, with the exception of Petitioner New York County Democratic Committee and Statutory Intervenor the Attorney General of New York, have filed letters with the Court consenting to all *amicus* briefs. Written consent from the remaining parties has been filed with the Court along with this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Unified Court System from January 31, 1985 until he was appointed to the Court of Appeals in 1987, where he served as Associate Judge and Senior Associate Judge for 14 years. Judge Bellacosa was Dean and Professor of Law at St. John's University School of Law from 2000 to 2004. He served as Chairman of the American Bar Association Section on Legal Education, Accreditation, and Admission to the Bar in 1995.

Hon. E. Leo Milonas served on the New York judiciary for 26 years, as Justice of the Supreme Court, as Associate Justice of the Appellate Division, and as Chief Administrative Judge of the New York State Unified Court System from 1993 through 1995. Judge Milonas currently serves on the New York State Commission on Judicial Selection and on the Governor's Judicial Screening Committee for the First Judicial Department.

Hon. Richard Rosenbloom served as Justice of the New York State Supreme Court and as a Judge of the Family Court. He currently serves as a member of the Character & Fitness Committee for the Seventh Judicial District.

Hon. Robert E. Whelan served as Justice of the New York State Supreme Court for 14 years. He is very familiar with the New York elections process, having been elected to one term on the Supreme Court and four terms as comptroller of Buffalo, New York.

The American Judicature Society, founded in 1913, is a national, non-profit organization with members who are judges, lawyers, and lay people dedicated to improving the administration of justice. It is funded through members' dues, contributions, and grant funds for special projects. For 94 years, the Society has remained true to its mission "to secure and promote an independent and qualified judiciary and a fair system of justice."

The Society's interest as *amicus curiae* in this case arises from its national perspective on judicial selection, ethics, and independence. From its founding, the Society has been a consistent voice in favor of reform of the process of judicial selection to ensure a bench of the highest quality. Through its Elmo B. Hunter Citizens Center for Judicial Selection, the Society has compiled comprehensive information on state judicial selection and made it available on-line at http://www.ajs.org/js. This website is the leading resource about the methods of selecting and retaining judges and includes information about successful and failed reform efforts, the roles of parties, interest groups, and professional organizations in judicial selection, and the diversity of the state courts.

In 1997, the Society established the Center for Judicial Independence in response to an increase in unfair criticism and efforts to remove from the bench judges who have issued unpopular rulings. Finally, through its Center for Judicial Ethics, the Society provides a forum for the exchange of information and promotes the enforcement of judicial ethics standards designed to promote confidence in the judiciary.[2]

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[2] As a matter of policy and procedure, no judicial member of the Society participated in the decision to file this brief or in its preparation. No inference should be drawn that any judge member of the Society's executive committee has participated in the adoption or endorsement of the positions of this brief.

SUMMARY OF ARGUMENT

> [T]he State has an overriding interest in the integrity and impartiality of the judiciary. There is hardly ... a higher governmental interest than a State's interest in the quality of its judiciary. Charged with administering the law, Judges may not actually or appear to make the dispensation of justice turn on political concerns.

Nicholson v. State Comm'n on Judicial Conduct, 409 N.E.2d 818, 822 (N.Y. 1980).

The process by which individuals are selected to join the bench—along with the public perception of how that process works—has profound and direct implications for promoting and maintaining public confidence in the judiciary. *See Mistretta v. United States*, 488 U.S. 361, 407 (1989). While Petitioners acknowledge New York's interest in protecting both the fact and the appearance of judicial independence throughout the election process, they misconstrue how that interest can be appropriately served. As Section I explains, the current convention system undermines rather than enhances public confidence in the judiciary. Consequently, the State does not have a compelling interest in maintaining this system, but rather has an affirmative due process obligation to change it.

The current system's failure results primarily from two shortcomings, as we discuss in Section II. First, there is a public perception that the political parties' county leaders handpick each party nominee. In many cases, the perception—and reality—is that, if a person desires to be a Supreme Court nominee in a particular district, the *only* option is to win the favor of one particular party leader. Petitioners forthrightly acknowledge that this perception exists—indeed, they concede that the political parties seek to reinforce this perception—but implausibly deny that the

political party leaders have actual control over the selection process.

Second, the current system lacks transparency. The party leaders and judicial-convention delegates who make the ultimate nominations or selections operate in nonpublic ways. They have no need—or desire—ever to explain their choices to the public. As a result, the public is left to wonder what criteria were used in selecting the nominees, whether any pressure was placed on the candidates, whether any promises were made, and whether any inappropriate financial factors played a part in the designations.

Petitioners and some *amici* (the Republican Party and the Cato Institute) argue that the State may not regulate the parties' internal candidate-selection processes. In making these arguments, Petitioners and *amici* fail to consider the unique nature of judicial elections and the State's duty to protect judicial independence. While a legislative or executive candidate or office-holder may publicly or privately promise to follow the dictates of a party boss, or to elevate the interests of party members over others, a judicial candidate or judge may not do so—because of the State's unique due process interest in an independent judiciary. *See* Section III. More importantly, this is not a case that pits political parties' associational rights against those of judicial candidates and their supporters. Here, the State of New York has imposed a process that deprives the political parties, their individual members, and judicial candidates ("insurgent" or not) of their respective associational rights, all the while denigrating the due process interest in an independent judiciary.

Rather than defending the current system, Petitioners, for the most part, attack the District Court's remedy. *See* Section IV.A. The necessity of fundraising for a primary election, they argue, *could* undermine the independence of judicial candidates *vis-à-vis* their donors. As a result,

Petitioners argue, the State has a compelling interest in avoiding primary elections. While we agree that there *can* be serious potential problems with unregulated primaries, such problems are not fatal to the District Court's decision. As the Second Circuit found, the State has numerous options at its disposal that would allow it to counteract any potential negative effects of such elections with less burden than the current system imposes on other constitutional interests. In any event, Petitioners' critique of primaries goes only to the appropriate remedy, and the fact remains that the current selection system unnecessarily undermines judicial independence.

Finally, the party-boss-dominated convention system is not essential, or even particularly well-suited, to the promotion of the other state interests Petitioners have identified. While we respect the New York Legislature's unique authority regarding the precise judicial-selection system that would best serve the State's interest, we note that the Legislature can implement alternatives to the current system that would preserve judicial independence, integrity, and quality, and still meet the State's other goals, such as increased racial and geographic diversity in the judiciary. In Section IV.B below, we discuss some of these alternatives.

Because New York's convention system for selecting nominees to the Supreme Court unconstitutionally and unnecessarily undermines public confidence in the State's judiciary, we urge this Court to uphold the Second Circuit's affirmance of the District Court's prudent judgment. We agree with the Respondents' brief in its entirety, and add the instant discussion, from the perspective of our experience with judicial independence, to supplement and bolster the arguments presented therein.

ARGUMENT

I. PUBLIC CONFIDENCE IN THE JUDICIARY IS A CORNERSTONE OF OUR GOVERNMENTAL FRAMEWORK.

Public confidence in the integrity, impartiality, and quality of the judiciary is essential to the administration of the legal system. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta*, 488 U.S. at 407. As discussed below, and as set forth in the Respondents' brief, New York's current system for selecting nominees for Supreme Court vacancies injures rather than enhances the reputation of the justices.

An impartial judiciary is much more than a self-evident best practice. It is a right guaranteed by the Due Process Clause of the United States Constitution. *See Republican Party v. White*, 536 U.S. 765, 775-76 (2002) (citing cases in which judges' lack of impartiality as to the parties violated due process); *see also In re Raab*, 793 N.E.2d 1287, 1290 (N.Y. 2003) ("[L]itigants have a right guaranteed under the Due Process Clause to a fair and impartial magistrate ....").

The New York Court of Appeals has found that the State must meet certain requirements in order to satisfy its due process obligation to maintain an independent judiciary. The Court of Appeals has identified two requirements that are of particular importance to this case.

First, not only must judges *be* impartial, competent, independent, and non-partisan, they must, in order to maintain public confidence in the legal system, *appear* to be so. Even if the public merely perceives that a judge favors one party, or is beholden to one set of interests, the system suffers, just as surely as if the judge actually were biased. *See In re Duckman*, 699 N.E.2d 872, 878 (N.Y. 1998)

("[T]he perception of impartiality is as important as actual impartiality ...."); *Nicholson*, 409 N.E.2d at 822 ("The State's interest is not limited solely to preventing actual corruption through contributor-candidate arrangements. Of equal import is the prevention of the 'appearance of corruption stemming from public awareness of the opportunities for abuse.'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 27 (1976))); *Raab*, 793 N.E.2d at 1290-91 ("[T]he State, as the steward of the judicial system, has the obligation to create [an impartial] forum and prevent corruption and the *appearance* of corruption, including political bias or favoritism." (emphasis added)). Accordingly, "the State's interest in ensuring that judgeships are not—and do not appear to be—'for sale' is beyond compelling. The public would justifiably lose confidence in the court system were it otherwise and, without public confidence, the judicial branch could not function." *Raab*, 793 N.E.2d at 1292.

Second, the State must enforce the fact and the appearance of judicial independence throughout the election process, not just once judges are on the bench. *Id.* at 1292-93. Absent such measures during elections, "there is a heightened risk that the public, including litigants and the bar, might perceive judges as beholden to a *particular political leader or party* after they assume judicial duties." *Id.* (emphasis added); *see also Brown v. Hartlage*, 456 U.S. 45, 52 (1982) ("Just as a State may take steps to ensure that its governing political institutions and officials ... maintain public trust and confidence, a State has a legitimate interest in upholding the integrity of the electoral process itself."); *Hurowitz v. Bd. of Elections*, 426 N.E.2d 746, 748 (N.Y. 1981) (identifying the particularly dangerous "risk of the appearance of impropriety that may be perceived by the public in a Judge's injection of himself into the political process for the sole purpose of extending his tenure"); *In re Watson*, 794 N.E.2d 1, 7 (N.Y. 2003) (explaining that New

York's Rules Governing Judicial Conduct forbid statements by judicial candidates "that single out a party or class of litigants for special treatment ... or [that] convey" that idea).

II. NEW YORK'S CONVENTION-BASED SYSTEM FOR SELECTING SUPREME COURT JUSTICES UNDERMINES PUBLIC CONFIDENCE IN THE JUDICIARY.

A. The Public Perception Is that Political Party Leaders, Rather than Voters, Actually Choose Judicial Nominees.

All parties to this suit agree that there is a widely held belief that the political parties' county leaders control the selection of Supreme Court nominees in New York. Respondents argued below that the power to make or break candidates for the Supreme Court rests solely in the hands of relatively few individuals: the county leaders of the two major political parties. The District Court collected an indisputable mountain of evidence to support its conclusion that "[t]he path to the office of Supreme Court Justice runs through the county leader of the major party that dominates in that part of New York State. Without his or her support, neither superior qualifications nor widespread support among the party's registered voters matters." Pet. App. 143a. The Second Circuit discerned ample support for the District Court's decision in the District Court record—and the public record.

New York's Commission to Promote Public Confidence in Judicial Elections (of which *amicus* Judge Bartlett was a member)—more commonly referred to as the "Feerick Commission"—reached the same conclusion. As quoted in the Second Circuit's opinion: "the uncontested evidence ... is that across the state, the system for selecting candidates for the Supreme Court vests almost total control in the hands of local political leaders. ... And in many parts of the State,

being on the dominant party's slate is tantamount to winning the election." Pet. App. 29a; *see also id.* at 29a-30a ("The Commission is hardly the only entity to reach this conclusion—it merely is the latest." (collecting sources)).

Even Petitioners acknowledge that the county party leaders successfully promote the appearance of control over the choice of nominees, though they dispute the District Court's conclusion of actual control. *See* Pet. App. 134a ("Defendants acknowledge that [New York County Democratic Committee Chairman Herman] Farrell appears to control the process, and claimed to do so under oath ..., but contend that he really does not."). Petitioners assert, for instance, that Farrell intentionally cultivates the widespread belief that he controls the selection of party judicial nominees, in order to "achieve[] one of his most significant objectives as a political leader—the perception of winning and 'running the show.' As [defense expert (and Petitioner) Douglas] Kellner testified: '[f]or Farrell ... an important part of being an effective leader is the perception that you're leading; that people are doing what you want.'" 2d Cir. J.A. 2017 (emphasis omitted). Thus, it is uncontested that, at a minimum, there is a public *perception* that county leaders—and not the electorate—control the selection of Supreme Court nominees.

B. The Convention Selection Process Is Not Transparent and Provides No Meaningful Assurance of Electoral Participation.

Another consequence of the current convention system is that the public has no real insight into the selection process. Even Petitioners agree that "the real voting process at a judicial convention does not occur at the convention, it occurs ... over the telephone and in the meetings that people have leading up to the convention in one or two weeks immediately before the convention." 2d Cir. J.A. 2013 (internal quotation marks omitted). As the District Court

explained, it is "clear that the decisions of who becomes a Supreme Court Justice are only ratified at conventions. They are made elsewhere. Not even the defendants contend otherwise." Pet. App. 129a.

The convention nomination system manifestly funnels the key decision-making through a relatively small group of powerful "insiders" who communicate in non-public ways and whose job it is to be overtly partisan and political. Thus, members of the public are left to speculate as to what criteria were used to make the judicial nominee choices, what pressures were applied to the nominees—some of whom are sitting lower-court judges, some of whom are incumbent Supreme Court Justices, and all of whom are prospective Supreme Court Justices—what promises were made, and what financial arrangements or considerations entered into the process.

Further, because the public believes that party leaders control nominee selection and because individuals have the right to make donations to political groups up to the date they become candidates for judicial office,[3] the current system fosters the perception that the party leaders might be selecting nominees for inappropriate reasons. The District Court honed in on this problem in its opinion:

> The record of financial contributions by candidates for Supreme Court Justice to political groups controlled by [Kings County Democratic Party Leader Clarence] Norman has fostered not only the (accurate) perception that he, rather than the voters or delegates, controlled the selection of the justices, but

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[3] Judicial candidates and sitting judges may not make donations to political organizations or political candidates, except that they may pay ordinary dues to political organizations of which they are members. *See* N.Y. COMP. CODES R. & REGS., tit. 22, § 100.5.

> the further perception that he used the wrong criteria in making his decisions.

Pet. App. 136a.[4]

The lack of transparency is especially problematic given that it occurs within a system that is supposed to guarantee and promote New York's constitutional mandate that the "justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve." N.Y. CONST. art. VI, § 6(c). New York has fostered and tolerated a system in which voters are not only deprived of *their* right to choose, but further are left to question whether they have been denied that right in order to allow others to use objectionable criteria to determine who will become judges. The current convention system thus fails—at the crucial juncture when the nomination is being bestowed—to provide constitutionally required assurances to the public of the nominees' integrity, competence, impartiality, and quality, and of the integrity of the selection process itself.

III. THE STATE MAY NOT CREATE AND ENFORCE A JUDICIAL-SELECTION SYSTEM THAT UNDERMINES THE FACT AND THE APPEARANCE OF AN INDEPENDENT AND IMPARTIAL JUDICIARY.

A candidate for state assembly or governor may proclaim publicly during an election campaign that she will always vote in line with the position of the Republican Party, that she will always favor the interests of tenants over landlords,

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[4] Indeed, Mr. Norman was recently convicted for extortion in a Brooklyn Supreme Court for "shak[ing] down judicial candidates in exchange for party support," or as Brooklyn District Attorney Charles J. Hynes put it, "'manipulat[ing] the judicial selection system and pervert[ing] the way judges are elected in this county.'" Michael Brick, *Former Democratic Leader Is Sentenced*, N.Y. TIMES, Apr. 17, 2007, at B2.

or—to take an example closer to the facts of this case—she may freely indicate that she will make decisions pursuant to the (lawful) dictates and interests of a particular party leader. In the context of legislative and executive elections, candidates have a First Amendment right to make such promises, and the voters have a First Amendment right to vote to enable such favoritism. *See Brown*, 456 U.S. at 55-58 (legislative or executive candidates have a First Amendment right to promise during an election that they will systematically favor one group of voters over another).

A candidate for a New York judgeship, conversely, may not favor, or appear to favor, the interests of any party, individual, or group of individuals. *See supra* Section I; *see also Watson*, 794 N.E.2d at 7 (New York's Rules Governing Judicial Conduct forbid candidates from making statements "that single out a party or class of litigants for special treatment ... or [that] convey" that idea); *White*, 536 U.S. at 775-76 (identifying maintenance of judicial impartiality as to parties as a legitimate state interest that might support constraints on speech rights); *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993) ("Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."). As a result, a judicial candidate may not promise, for instance, to follow the dictates of a particular party leader, and an elected judge may not follow through with such a promise, even if the majority of voters or the majority of members of the local party were to support the idea.

Because of its unique obligation to maintain judicial independence, the State may, and sometimes must, regulate judicial elections in ways that would be unnecessary for other types of elections. In some instances, these steps require that due process take precedence over electoral participants' First Amendment interests. *See Raab*, 793

N.E.2d at 1292 (In a judicial election, "a number of competing interests are at stake, almost all of a constitutional magnitude. Not only must the State respect the First Amendment rights of judicial candidates and voters but also it must simultaneously ensure that the judicial system is fair and impartial for all litigants, free of the taint of political bias or corruption, or even the appearance of such bias or corruption."); *Republican Party v. White*, 416 F.3d 738, 784 (8th Cir. 2005) (en banc) (Gibson, J., dissenting) (weighing First Amendment interests against "due process and separation of powers interests" relating to judicial independence), *cert. denied sub nom. Dimick v. Republican Party*, 126 S. Ct. 1165 (2006); *In re Bybee*, 716 N.E.2d 957, 960 (Ind. 1999) (acknowledging that some cases require balancing First Amendment rights against due process interests in preserving the impartiality of the judiciary); *see also Buckley*, 997 F.2d at 227 (two principles are in conflict when regulating judicial elections, and "[j]ustice under law is as fundamental a part of the Western political tradition as democratic self-government and is historically more deeply rooted").

But this case does not require such balancing, as Respondents' Brief sets forth clearly. *See* Br. for Respondents at 35-37. Despite Petitioners'--(and their *amici*'s) arguments to the contrary, this is not a case pitting political parties' constitutional rights of association against those of certain judicial candidates and their supporters. Rather, here, New York has created and enforces a system that *interferes* with the associational rights of political parties, judicial candidates, and their supporters, and with the State's own interest in promoting judicial independence. The political parties have not created the current convention system, and are not free to deviate from it (irrespective of whether their current leadership would choose to do so). Thus, Petitioners' arguments based on the political parties' associational rights are inapposite.

In this respect, this is a much easier case than the speech restrictions evaluated by this Court in *Republican Party v. White*. There, a judicial candidate's right to speak his mind and associate with potential supporters had to be balanced against the state's interest in an impartial judiciary. 536 U.S. at 774-75. Here, the constitutional interests of the political parties (no matter how unwilling they may be to assert them in this litigation) and judicial candidates, as well as the State's interest in judicial impartiality, all lead to the inescapable conclusion that the current system must be abolished.

IV. THE CONVENTION SYSTEM IS NOT NARROWLY TAILORED TO ACHIEVE STATE INTERESTS; ALTERNATIVES EXIST THAT WOULD NOT BURDEN CONSTITUTIONAL RIGHTS OR UNDERMINE CONFIDENCE IN THE JUDICIARY.

Petitioners have identified several state interests which they assert justify any burden on constitutional rights: judicial independence, racial and ethnic diversity, and geographic diversity. *See* Br. for Pet'rs N.Y. County Dem. Cmte. *et al.* at 46-47. But their arguments provide little support for how the current system advances these laudable goals. Instead, Petitioners mostly argue why they believe primary elections for judges would advance these interests less than the current system. Below, we explain that even if Petitioners were correct, such arguments are insufficient to justify the continued existence of the current system. Then, we discuss several judicial-selection mechanisms that could be applied in conjunction with, or instead of, a primary system. Any one of these would both advance Petitioners' goals, and do so in a manner consistent with constitutional principles.

A. Petitioners' Criticisms of Judicial Primaries Do Not Bolster the Current System.

Petitioners do not attempt, except in the most oblique way, to refute the obvious conclusion from the above—namely, that the State's interest in judicial independence counsels against a party-boss-dominated system that creates the appearance of improper influence over the judiciary. Instead, Petitioners merely criticize the District Court's proposed remedy. *See, e.g.*, *id.* at 47-49. They assert that a primary system would put severe financial burdens on judicial candidates, and that those burdens would, in turn, undermine judicial independence because candidates would need to seek contributions from donors to whom they could feel indebted.

We agree that placing severe financial burdens on judicial candidates is highly inadvisable for a number of reasons, including the potential effects of large donations on the appearance and fact of judicial independence. Nevertheless, Petitioners' legal argument is flawed. As the Second Circuit concluded, Petitioners' apparent suggestion—a complete ban on judicial primaries—is not narrowly tailored to address the asserted goal of removing political donor influence over judges:

> [L]ess burdensome means exist to serve that end. To the extent that fundraising may implicate bias, New York could provide for public campaign financing. New York also could require that judges be disqualified from cases in which one party has contributed substantially to the judge's campaign. Further, New York could pass a narrowly tailored law preventing a judicial candidate from campaigning based on her views for or against particular parties [to litigation].

Pet. App. 76a (citation omitted); *see infra* Section IV.B.1.

Petitioners' assertion is also inconsistent with New York's use of open primaries to select candidates for numerous judicial positions other than Supreme Court Justices. *See* Pet. App. 98a ("All other elected judges in New York State are nominated in a direct primary election, rather than in a judicial convention."). Moreover, these other lower-court judges, elected in open primaries, may all "be appointed to serve as 'Acting Supreme Court Justices,' exercising the full powers, duties and jurisdiction of a Supreme Court Justice" in New York. *Id.*; *see, e.g.*, N.Y. ELEC. LAW § 6-168 (primary elections for Civil Court judges).

Petitioners' argument appears to rest, at least in part, on the notion of legislative deference. In particular, Petitioners ask this Court to accord such deference to the determinations made by the New York Legislature during its brief experience with Supreme Court primary elections nearly a century ago. *See* Br. of Pet'rs N.Y. County Dem. Cmte. *et al.* at 44 (asking this Court to "give due deference to the careful policy choice of New York's legislature" in adopting judicial nominating conventions "[a]fter a failed nine-year experiment with direct primaries in the early twentieth century"). It goes without saying that the considerations and circumstances used to justify nominating conventions in 1922 may no longer be relevant today. The District Court's opinion—like the Feerick Commission's reports, and the steady stream of criticism of the New York system that has amassed over the decades—speaks directly to this disconnect.[5]

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[5] As former New York City Mayor Edward Koch put it: "New York's convention system for electing Supreme Court Justices has gone largely unchanged for the forty-plus years that I have been familiar with it. The undemocratic, boss-run system that I observed in the 1960s appears to operate no differently today than it did back then." Br. of Edward I. Koch as *Amicus Curiae* at 6.

In any event, Petitioners' judicial-independence argument is merely a challenge to the District Court's chosen remedy; it does not affirmatively support the current system. Petitioners raise the specter of judicial-independence issues that conceivably could arise if the District Court's injunction went into effect, and if the State took no further action. Hypothetical problems with a temporary replacement system, however likely to develop, cannot substitute for proof that the *current* system accords with due process. Petitioners' attempt to divert focus to the District Court's selected remedy should not obscure the obvious need to enjoin New York's current judicial-selection system.

B. Within the Framework of the New York Constitution, There Are Reforms Available to the Legislature to Ensure Judicial Independence, While Addressing the Other Concerns That Have Been Raised.

Given that numerous judges, executive officials, and legislators are elected throughout New York and the rest of the United States without a party-boss-dominated convention system, it is obvious that there are alternative permissible election systems, and it is equally obvious that the current system is not narrowly tailored to achieve Petitioners' identified state interests.

The Feerick Commission has suggested one potential alternative—a thoroughly revamped convention system that minimizes the fact and the appearance of party-leader control.[6] The parties and District Court focused on another

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[6] The Commission concluded that, in order to prevent party-leader control, the convention system should be modified in at least the following ways: (1) reduce the number of delegates at each convention, (2) ensure at least two delegates from each assembly district, (3) weight the delegates' votes based on the populations they represent, (4) reduce the number of signatures required to run as delegate, (5) increase the delegates' terms of service from one year to three, (6) improve the

—a direct primary election system—which removes party leaders from direct involvement. *See* Pet. App. 184a. It is up to the New York Legislature to determine which of these systems to adopt, provided that it builds sufficient safeguards into the process to satisfy the State's constitutional duty to ensure an independent, qualified judiciary. Below, we list some potential reforms, among the wide variety available, that are well suited—whichever basic framework the State uses—to achieving the various state interests that have been identified, while also fulfilling the State's constitutional obligation to ensure public confidence in the judiciary.

1. *Public Financing of Judicial Elections Would Preserve Judicial Independence and Public Confidence.*

All parties agree that the need to raise campaign contributions could compromise the appearance of judicial independence. *See* Pet. App. 178a; 2d Cir. J.A. 2047. Indeed, "from the perspective of the public, the media, and many court reform organizations, the old adage that 'money talks' is accepted wisdom when it comes to assessing whether judges are likely to be influenced by the campaign contributions they receive." Am. Bar Ass'n Standing Cmte. on Judicial Indep., *Report of the Commission on Public Financing of Judicial Campaigns* 20 (Feb. 2002) [hereinafter "ABA Report"], *available at* http://www.abanet.org/judind.

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variety, quality, and timing of information provided to delegates, and (7) give candidates the right to address delegates at the convention. *See* Comm'n to Promote Public Confidence in Judicial Elections, *Final Report to the Chief Judge of the State of New York* 17-18 (Feb. 6, 2006) [hereinafter "Feerick Commission Final Report"], *available at* http://law.fordham.edu/commission/judicialelections. In fact, the Feerick Commission suggested a panoply of additional reforms—including many of those discussed below—which it recommended that the Legislature adopt in order to enhance the State's judiciary.

On the other hand, "[s]ubstituting public money for private money removes any concern that there is a connection between campaign contributions and judicial decision-making. Instead, a judge depends on exactly the people he or she serves—all the citizens of New York—for campaign financing." Comm'n to Promote Public Confidence in Judicial Elections, *Second Report to the Chief Judge of the State of New York* 24 (June 29, 2004) [hereinafter "Feerick Commission Second Report"], *available at* http://law.fordham.edu/commission/judicial-elections; *see also* ABA Report at 30. Consequently, particularly if the Legislature chooses to implement direct primary elections of Supreme Court candidates, the State could adopt public financing for these elections.[7] Public financing has worked to promising effect in other jurisdictions, including Arizona, Illinois, Idaho, North Carolina, Texas, and Wisconsin. *See* Feerick Commission Second Report at 30.

In addition to preserving judicial integrity, publicly financed elections would allow a wider group of candidates to run for judicial office and reduce the public perception that only wealthy or politically motivated people can become judges. This would obviate concerns along these lines raised by Petitioners. *See* Br. for Pet'rs N.Y. County Dem. Cmte. *et al.* at 44; 2d Cir. J.A. 2047-52.

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[7] We note that the Feerick Commission recommended that absent public financing, the Legislature should choose a significantly modified convention system over a direct primary system. *See* Feerick Commission Final Report at 16 ("Given the likelihood that the introduction of judicial primary races would draw major financial contributions into judicial elections, the Commission recommends retaining judicial district nominating conventions, subject to significant reforms, at least until New York adopts public campaign financing of judicial elections.").

2. *Retention Elections Would Preserve Independence for Incumbent Justices.*

Respondents and the District Court have noted that the perception of an independent judiciary is particularly strained whenever a sitting Justice is running for reelection, seeking contributions for his or her campaign, and soliciting votes from either political party leaders or the public at large. *See* 2d Cir. J.A. 2047; Pet. App. 178a. Petitioners agree that this is the case with respect to direct elections, but argue that the current convention system protects Justices facing reelection from the pressure to render politically favorable decisions. *See* 2d Cir. J.A. 2051. But Petitioners provide no rationale why—let alone evidence that—political-party leaders or judicial-convention delegates are less likely than the public to punish a sitting Justice for the decisions he or she has rendered. To the contrary, the current system subjects sitting Supreme Court Justices to the risk that they must curry favor with—or at least not antagonize—political bosses in order to secure renomination.

On the other hand, retention elections—in which incumbent Justices are subject to non-competitive, non-partisan elections in the year before their terms expire—would insulate sitting Justices from political-leader pressure while also mitigating potential pressure from the public. For this and related reasons, the Feerick Commission specifically recommended adoption of retention elections. *See* Feerick Commission Second Report at 35. Such elections are currently used in twelve states for trial court judges, and in twenty states for appellate judges and justices. Hon. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1429 (2001).

3. *Education and Screening Would Address Fears that Voters Would Elect Unqualified Justices.*

Petitioners argued before the District Court that the convention system was implemented, in part, out of concern that the primary system would not ensure that qualified candidates are seated on the judiciary. 2d Cir. J.A. 1977-78. But advances in government transparency and communications—such as candidate screening, voter education, and public financing—can be used alongside primary elections to improve voters' knowledge and understanding, and consequently the quality of those they elect.[8]

For example, a nonpartisan screening program would help ensure the quality of the bench, and dissemination of the results would assist in ensuring confidence in the judiciary. *See, e.g.*, Hon. Jonathan Lippman, *The Public Policy Forum: Court Reform in New York State* 8 (May 17, 2005), *available at* http://www.rockinst.org. As of 2001, six other states had evaluation programs for retention elections. *See* Seth S. Andersen, *Judicial Retention Evaluation*, 34 LOY. L.A. L. REV. 1375, 1379 (2001).

There is precedent for, and growing use of, screening committees in New York. The State already uses a screening commission to identify qualified candidates for vacancies on

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[8] Moreover, the current system is considered by some (such as New York City Corporation Counsel Michael Cardozo) to favor politically connected, rather than particularly qualified judges: "There is a judicial selection crisis in this state. The system has not only been found unconstitutional, but it is producing candidates who clearly are not the most highly qualified." Michael Cardozo, *Mending a Broken Bench*, JUDICIAL REPORTS (Sept. 2006) ("The decision on who will become a judge has been left solely in the hands of a small group of people: county political leaders. As one Supreme Court justice ... [has] said, 'You don't have to know something to be a judge, you have to know somebody.'"), *available at* http://www.judicialreports.com.

the Court of Appeals. N.Y. CONST. art. VI, § 2(c)-(e). The governor may only appoint a candidate who has been recommended by the commission. *Id.* § 2(c). Further, although not statutorily mandated, two of New York's twelve judicial districts use screening commissions to evaluate the qualifications of Supreme Court candidates. *See* Pet. App. 148a-150a.

Based on the proven benefits of nonpartisan screening, in February 2006, the New York Unified Court System promulgated a rule requiring the creation of judicial screening commissions in the remaining judicial districts. *See* N.Y. COMP. CODES R. & REGS., tit. 22, § 150.0 *et seq.* These commissions will evaluate candidates for most courts, including the Supreme Court. *Id.* § 150.1. Although these rules do not have the force of law, the Legislature could choose to give these screening commissions an official role in the elections or appointment process.

Voter guides would similarly help the electorate make informed decisions. *See* Feerick Commission Second Report, app. G-8, at 3. In addition to describing the candidates, voter guides can explain the election process and provide any information that may have emerged through the screening process. By including all of this information, voter guides can enhance the transparency of the election process. Moreover, the Feerick Commission's research showed a strong nexus between voter education and public confidence in judicial elections. *Id.* at 38. Currently, thirteen states distribute voters guides and numerous studies have found that the public values this information. *See, e.g.*, Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voter Guides*, 64 OHIO ST. L.J. 84, 87-90 (2003).

C. Over the Longer Term, the State Has Additional Options to Ensure Judicial Independence While Addressing Other Concerns.

The Legislature could make the changes described above to enhance the judicial selection process over the short term. Given provisions in New York's Constitution, certain other changes would involve more time and possibly require amendments to the State Constitution.

1. *Smaller Judicial Districts Would Achieve Geographic, Racial, and Ethnic Diversity, and Would Reduce the Cost of Campaigns.*

The judicial districts from which Supreme Court Justices are elected are created by Article VI, Sections 6(a)-(c) of the New York Constitution. Pursuant to Section 6(b), once every decade, the Legislature may increase the number of judicial districts (and thereby make the resulting districts smaller). The Constitution does not limit the number of districts, but it does mandate that each district be no smaller than one county. Consequently, if the State chooses to create judicial districts that are smaller than one county, or to otherwise redefine the districts in any year except the tenth year, Article VI of the State Constitution must be amended.

The State could create smaller judicial districts in order to enhance racial, ethnic, and geographic diversity within the judiciary. Petitioners themselves identified diversity in all of these forms as important interests in selecting nominees for the Supreme Court. Pet. App. 70a.[9] We acknowledge those goals and note further that in addition to its other benefits, diversity bolsters public confidence in the judiciary. As New

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[9] The Second Circuit and District Court further noted how poorly the current system effectuates these goals. *See* Pet. App. 74a-75a; *e.g.*, *id.* at 174a (under the current system, "[d]elegates elected from ADs in which they need not even reside select justices who need not even be residents of the districts in which they are later elected").

York Court of Appeals Chief Judge Judith Kaye has written, "a diverse bench gives the public a feeling of inclusion in the justice system, willing to place its trust and faith in it, not alienated from it." Judith S. Kaye, *The Road to the Judiciary: Navigating the Judicial Selection Process*, 57 ALB. L. REV. 961, 975 (1994).

It is axiomatic that geographic diversity can be achieved through smaller, appropriately tailored, judicial districts. The District Court's logic is irrefutable: "[t]he more direct and democratic way to serve geographical diversity is to define the geographic areas from which representation is desired, draw lines around them, and have the voters within them select the nominees." Pet. App. 174a.

Likewise, with respect to racial and ethnic diversity, even Petitioners' own witnesses admit that creating smaller judicial districts would "very likely" promote the goal of a diverse bench. Petitioners' expert witness, Dr. Michael Hechter, testified that "with respect to minority representation, if the judicial districts were very much smaller and were either ethnically or geographically homogenous, it is very likely that there would be greater representation of those particular groups." 2d Cir. J.A. 1787-88. Moreover, Petitioners themselves acknowledged the empirical reality that minorities tend to do well in Civil Court races because the Civil Court districts are "smaller electoral units—such as Harlem or Washington Heights." *Id.* at 2040.[10]

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[10] Moreover, it is arguable that the current system, even if it manages to place a certain number of minorities into the New York judiciary, does those candidates, and all other qualified minority candidates, a disservice. As several minority legal groups have put it: "Minorities seeking to become supreme court justices in New York are not served by a closed, back-door system built on cronyism and political favors. No diverse, fair system can be built by such means." Br. of *Amici Curiae* Asian Am. Legal Defense & Educ. Fund *et al.*, at 4.

Finally, smaller judicial districts would likely reduce concerns about financing of electoral campaigns. Currently, many of the upstate districts span multiple large counties, which could place a significant burden on campaigning judicial candidates. Smaller districts would allow candidates to campaign without the necessity of generating sufficient funds to advertise to multiple audiences. *See also* Sections III.A.1 and III.A.4 above (outlining other methods of addressing campaign finance issues).

2. *An Appointment System with Sufficient Safeguards Could Be Used to Promote Judicial Independence and Quality.*

Finally, the State could meet its duty to ensure public confidence in the judiciary by replacing the current selection system in its entirety with an appropriately tailored appointment system. In order to do so, the State would have to amend Article VI, Section 6(c), which currently requires that Supreme Court Justices be elected. Though it would require a constitutional change, the appointment system is not without precedent in the New York court system, and is notably used for judges of the Court of Appeals (a change implemented in New York's 1977 constitutional reform).

When considering this type of change, it is important to note that switching to an appointment system, in and of itself, is not sufficient to ensure public confidence in the judiciary. After all, as the Second Circuit noted, the current system amounts to a "de facto appointment" system. Pet. App. 70a.[11] In order to comply with its constitutional obligations, any appointment process the State creates must be transparent. The process should thus also include other

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[11] *See also* Testimony of Mark H. Alcott, President, N.Y. State Bar Ass'n Before the N.Y. State Assembly, Judiciary Cmte. (Nov. 15, 2006) ("What New York has now is an appointive system. It purports to be an elective system, but in reality it is an appointive system."), *available at* http://www.nysba.org.

protections, such as the screening panels discussed above, in order to ensure a qualified and independent Supreme Court judiciary.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Second Circuit.

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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, ET AL.,
Petitioners,

v.

MARGARITA LOPEZ TORRES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICUS CURIAE. .	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE SECOND CIRCUIT PERCEIVED A "BURDEN" AT THE DELEGATE-SELECTION STAGE THAT DOES NOT EXIST	5
A. New York Judicial Candidates Play No Role In Delegate Selection And Thus Can Suffer No Burden At This Stage Of The Process	5
B. The Second Circuit Found A Burden On Judicial Candidates At This Stage By Analyzing An Election System That Never Was	7
II. THE SUPPOSED "BURDEN" AT THE CONVENTION STAGE HAS NOTHING TO DO WITH STATE LAW ITSELF AND IS SIMPLY PARTY POLITICS IN ACTION	12
A. The Court Below Found A "Burden" At The Convention Stage Because Delegates Often Nominate The Candidates Endorsed By Party Leaders.	12
B. The Second Circuit's Conclusion Is Not Only Untethered From State Law, But Chills Perfectly Acceptable Party Activity.	14

TABLE OF CONTENTS—Continued

Page

III. THE SECOND CIRCUIT ERRED IN BASING ITS "SEVERE BURDEN" FINDING IN PART ON ONE-PARTY DOMINANCE..... 20

CONCLUSION..... 27

TABLE OF AUTHORITIES

Page

Cases:

American Party of Texas v. *White*, 415 U.S. 767 (1974) 3, 4, 6, 7, 10

Anderson v. *Celebrezze*, 460 U.S. 780 (1983) 7, 11, 16, 23

Bullock v. *Carter*, 405 U.S. 134 (1972) ..... *passim*

Burdick v. *Takushi*, 504 U.S. 428 (1992) 24

California Democratic Party v. *Jones*, 530 U.S. 567 (2000) 1, 2

Clements v. *Fashing*, 457 U.S. 957 (1982) 15

Eu v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) 2, 15, 19

Georgia v. *National Democratic Party*, 447 F.2d 1271 (D.C. Cir.), *cert. denied*, 404 U.S. 858 (1971) 23

Jenness v. *Fortson*, 403 U.S. 431 (1971) 6

Republican Party of Minnesota v. *White*, 536 U.S. 765 (2002) 1, 10

Ripon Soc'y v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert denied*, 424 U.S. 933 (1976) 16, 17

Tashjian v. *Republican Party of Connecticut*, 479 U.S. 208 (1986) 2, 11, 15

United States v. *Classic*, 313 U.S. 299 (1941) 23

Williams v. *Rhodes*, 393 U.S. 23 (1968) 11, 15

TABLE OF AUTHORITIES—Continued

	Page
Constitutional and Statutory Provisions:	
U.S. Const. amend I	2, 10
U.S. Const. amend XIV	24
Ind. Code Ann § 3-8-4-2	18
Ind. Code Ann. § 3-10-2-15	18
N.Y. Const. art. III, § 5	5
N.Y. Elec. Law § 6-106	5
N.Y. Elec. Law § 6-124	5, 13
N.Y. Elec. Law § 6-126	13
N.Y. Elec. Law § 6-134(4)	6
N.Y. Elec. Law § 6-136(2)(i)	6
N.Y. Elec. Law § 6-136(3)	6
N.Y. Elec. Law § 6-158	5
N.Y. Elec. Law § 6-158(5)	13
N.Y. Elec. Law § 6-160(2)	5
N.Y. Elec. Law § 7-116(1)	5
S.C. Code Ann. § 7-9-70	19
Va. Code Ann. § 24.2-509	17
Rules:	
S. Ct. R. 37.3(a)	2
S. Ct. R. 37.6	1

TABLE OF AUTHORITIES—Continued

Page

Other Authorities:

AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY, AND POLITICAL CHANGE (Harvey L. Schantz ed., 1996) 17, 19

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The Center for Voting and Democracy, *Uncontested State Legislative Races 2002-2004, available at* http://www.fairvote.org/?page=717 25

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TABLE OF AUTHORITIES—Continued

Page

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Website of the Buchanan County Democratic Committee, *available at* http://buchanandemocrats.com 18

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Republican National Committee ("RNC") is the national political organization of the Republican Party of the United States.[1] The RNC is involved in the full spectrum of party-building activities, ranging from endorsing candidates, to supporting candidates and party organizations, to sponsoring voter registration, education, and turnout programs.

The RNC promotes candidates in all fifty states for a myriad of state and local offices from the statehouse to the courthouse. The RNC is directly affected by a ruling, such as the ruling of the Court of Appeals for the Second Circuit in this case, that limits a political party's ability to form a strong leadership group, endorse and support candidates, and generally organize itself as it sees fit to advance the party's interests. The RNC also is directly and adversely affected by a rule of law, such as that announced by the Second Circuit, that ties the constitutionality of state election statutes to the independent actions of party officials. Simply put, the Second Circuit's ruling in this case has the potential to limit severely the ability of the RNC to engage in the kind of core political speech and association that is central to its purpose and that it routinely promotes in other states, including by endorsing candidates for public office.

The RNC has filed briefs *amicus curiae* with this Court in numerous ballot access and other voting rights cases in recent years. *See, e.g.*, *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002); *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000). Because of the direct impact of the Second Circuit's ruling on the speech and associational rights of political parties, and because of the RNC's experience in

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the RNC, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

supporting candidates for judicial office across the nation, the RNC is well positioned to assist this Court in its consideration of the issues presented for review.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). The requisite consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

First Amendment associational rights in the electoral context are not limited to voters and candidates. On the contrary, political parties enjoy First Amendment rights to pick and promote candidates for office. Indeed, this Court has "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.' " *California Democratic Party* v. *Jones*, 530 U.S. 567, 575 (2000) (quoting *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)). A political party also enjoys the right to organize as it sees fit to accomplish those tasks—in the Court's words, to determine "the boundaries of its own association, and * * * the structure which best allows it to pursue its political goals." *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 224 (1986).

The decision of the Court of Appeals for the Second Circuit in *Lopez Tórres* v. *New York State Board of Elections*, 462 F.3d 161 (2d Cir. 2006) (Pet. App. 1-85), encroached on these established rights of political parties in at least four ways. One of the encroachments—the court's erroneous application of strict scrutiny, in lieu of recognizing the countervailing rights of political parties and balancing them against the rights of candidates—has been the focus of argument by petitioners. *See, e.g.*, Reply Brief for Petitioners New York State Board of Elections *et al.* at 8. The RNC subscribes to their points but will not reiterate them here. Instead, this brief will focus on three other aspects of the Second Circuit's approach, all of which managed not only to give short shrift to the rights of political parties but also to

denigrate "the breadth of power enjoyed by the States in determining * * * the manner of elections[.]" *Bullock* v. *Carter*, 405 U.S. 134, 141 (1972).

First, the Second Circuit discerned "burdens" that do not, in fact, exist at the first stage of New York's judicial election scheme, during which party voters choose delegates for the subsequent nominating convention. The court found that it would be unduly difficult for a judicial candidate to assemble a full slate of committed delegates and inform voters which delegates to support. But New York's election law does not contemplate that a judicial candidate will do either of these things. Rather, the law calls for the selection of *unaffiliated* delegates: The rank-and-file voter does nothing more than choose a proxy, aligned to no judicial candidate, who later will attend the judicial convention and pick the nominees of his or her choosing. Judicial candidates have no contemplated role in this delegate-selection stage of the process. The Second Circuit, by overlooking this fact and proceeding as if New York had adopted a direct primary, effectively punished the state for *not* having adopted one. But New York, like any state, has the perfect right to adopt a mechanism other than the direct primary for the resolution of intraparty competition. *American Party of Texas* v. *White*, 415 U.S. 767, 781 (1974). The Second Circuit's decision, in short, curtailed the state's right to structure its elections. In so doing it diminished party rights by enshrining one approach to party decision-making to the exclusion of all others. The Court should not permit such judicial second-guessing in the very arena—nominee selection—where party associational rights are at their strongest.

Second, the court below discerned chimerical "burdens" at the second stage of New York's judicial election scheme, the nominating convention. The court noted that party leaders very often endorse slates of candidates for nomination at the convention, and that the elected delegates very often sign on to those recommendations from their party leaders. This decision-making process, the court concluded, constitutes an unwarranted burden on candidates who do not win party

leaders' favor. Here again, the court below erred. Such a supposed "burden" has nothing at all to do with the law under review, and is nothing more than party politics in action. The enshrinement into constitutional law of the Second Circuit's approach on this point would be both ahistorical and potentially destabilizing: If New York's election system is unduly burdensome because party leaders wield strong influence over party decision-makers, then presidential nominating conventions from the mid-19th century through at least 1968 were most likely unconstitutional—and more importantly, current election laws and practices in many states are potentially unconstitutional as well.

Third, the Second Circuit relied, as part of its justification for striking down New York's law, on the notion that many of New York's judicial districts have a single dominant party. But this Court has never said that one-party dominance is a factor in the burden analysis in ballot access cases. The Court should dispel this errant notion before it takes root. One-party dominance is demonstrably irrelevant to the burden analysis. It makes no difference to a candidate who unsuccessfully seeks his party's nomination, or to his supporters, if the *other* major political party is competitive come election day.

In short, the Second Circuit's decision skews the careful balance this Court has maintained between the rights of voters, candidates, and parties, and the interests of states in crafting election structures. In so doing the Second Circuit threw into serious question the rights of parties to organize in the way they believe best serves their interests. This Court should reverse the decision below and (1) reaffirm that states are not required to employ direct primaries or their equivalent for resolution of all intra-party contests, *American Party of Texas*, 415 U.S. at 781, and (2) clarify that the decision of party members to follow party leaders' recommendations in choosing a nominee cannot possibly constitute a severe burden for purposes of First Amendment ballot access analysis.

ARGUMENT

I. THE SECOND CIRCUIT PERCEIVED A "BURDEN" AT THE DELEGATE-SELECTION STAGE THAT DOES NOT EXIST.

A. New York Judicial Candidates Play No Role In Delegate Selection And Thus Can Suffer No Burden At This Stage Of The Process.

1. New York State is divided into 12 judicial districts. Pet. App. 11, 86. The election of Supreme Court justices take place in each of the 12 districts and consist of three phases. First, rank-and-file voters from each political party select unaffiliated judicial delegates to attend a subsequent nominating convention. Second, the chosen delegates attend the convention and select party nominees. Third, those judicial nominees compete in the general election against anyone else who has gained a spot on the ballot by collecting voter signatures. Pet. App. 10; *see also* N.Y. Elec. Law §§ 6-106, 6-124, 6-158, 7-116(1).

In the first phase, the convention delegates are selected by rank-and-file party voters in subdivisions of the 12 judicial districts, known as "assembly districts." *See* N.Y. Const. art. III, § 5. On delegate-selection day in early September, the voters in each assembly district choose several delegates and several alternates from among those citizens who are running for office—*i.e.*, those who have gathered signatures and been placed on the delegate ballot. Pet. App. 11-12. The top vote-getters win the delegate slots and earn the right to serve as delegates at the subsequent judicial nominating convention.[2]

2. Two crucial facts about this delegate-selection process are key in analyzing the Second Circuit's decision. First, just

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[2] If the number of candidates for delegate from a given party in a given assembly district is less than or equal to the number of available delegate slots for that party in that district, then, as common sense would dictate, the candidates are all deemed elected—the assembly district does not bother to hold a vote in which all candidates will win. *See* N.Y. Elec. Law § 6-160(2).

about anyone who wants to do so can run to be a delegate. The requirements to be placed on the ballot are not onerous—indeed, the *only* relevant requirement of note is that the delegate candidate gather 500 valid signatures from party members residing in his or her district. *Id.* at 12 (citing N.Y. Elec. Law §§ 6-134(4), -136(2)(i), (3)).

Second, those interested in running for judge have *no role* in the delegate-selection stage, and state law contemplates no interaction between rank-and-file voters and judicial candidates at this stage. Such rank-and-file voters are simply entrusted to select unaffiliated delegates who later will pick nominees for their party. The delegate candidates, in other words, are not pledged to a particular judicial candidate. Pet. App. 107. Indeed, they cannot be, because the convention that the delegates will later attend is required to select multiple nominees, one for each of the judicial slots up for election. In short, this is not a direct primary, or even, to coin a phrase, a "quasi-direct" primary in the manner of most states' presidential primaries, where each voter chooses a presidential nominee and the national convention delegates are apportioned accordingly. Rank-and-file voters in the New York delegate elections are not weighing in on who the judicial nominees should be.

3. Properly analyzed, there are no burdens of constitutional significance in this system. The 500-signature requirement for convention delegate candidates is unobjectionable on its face. *See American Party of Texas*, 415 U.S. at 789 (stating that any argument that a 500-signature requirement is objectionable "approaches the frivolous"); *Jenness* v. *Fortson*, 403 U.S. 431, 438, 442 (1971) (approving requirement that minor-party candidates gather signatures from five percent of the number of registered voters at the last election). Nor do voters face barriers: They may cast their votes for any would-be delegate who fulfills the modest signature requirement. None of the sorts of structural barriers that have led this Court to strike down state ballot access laws are present here. *See, e.g., Bullock*, 405 U.S. at 134 (striking down exorbitant filing fees required to run in primary elections for

local offices); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983) (striking down Ohio law barring candidates from a spot on the ballot for President unless they registered more than seven months in advance). Indeed, this Court's primary concern has been with ballot access restrictions that tend to " 'limit the field of candidates from which voters might choose.' " *Celebrezze*, 460 U.S. at 786 (quoting *Bullock*, 405 U.S. at 143). Here, there are no such restrictions. The candidates in question at this phase are the delegate candidates, and nothing blocks their participation.

B. The Second Circuit Found A Burden On Judicial Candidates At This Stage By Analyzing An Election System That Never Was.

The Second Circuit nonetheless deemed the delegate selection process to impose a severe burden on associational rights. But it did so by implicitly positing a type of election—a direct primary—that New York does not have and then measuring the *actual* New York system against that standard. Because nothing in constitutional law forces a state to adopt the direct primary for purposes of resolving its intraparty contests, *see American Party of Texas*, 415 U.S. at 781, the Second Circuit's approach should not be permitted to stand.

1. The court began by recognizing that "judicial candidates do not run in the [delegate] election themselves." Pet. App. 11. But instead of acknowledging that this is because the statutory scheme is designed to funnel the judicial candidates' campaigning energies to the subsequent convention—and that this is a perfectly legitimate way to structure internal party decision-making—the court created a role for judicial candidates at the delegate-selection stage. It wrote that they "have the option of assembling a slate of delegates to run on their behalf, with an eye toward placing those delegates at the judicial nominating convention so that they can cast their votes in favor of the candidate with whom they are affiliated." *Id.*

This analytical move drove the rest of the court's opinion. The court seized on the idea that a judicial candidate should (1) assemble a slate of committed delegate candidates, one from every assembly district; (2) gather enough signatures to place all of those delegate candidates on the ballot; and (3) market himself to rank-and-file party voters in every assembly district, letting those voters know which delegate candidates were committed to support him. The court analyzed the difficulty of accomplishing such a feat and concluded that it would be severe. First, the judicial candidate would have to find a dedicated delegate candidate in each assembly district—between nine and 24 candidates in all. *Id.* Second, the judicial candidate would have to collect between 9,000 and 24,000 signatures to get all of those delegate candidates on the ballot; dozens of workers would be required for this task. *Id.* at 13-14.[3] Third, the judicial candidate would have to run an expensive public relations campaign in every assembly district. *Id.* The court concluded that all of this, taken together, would be too much for most candidates. It cited testimony from judges and judicial candidates to the effect that these "requirements of the process * * * effectively foreclosed their ability to access the [delegate] election phase." *Id.* at 14. And its finding on this point was at the heart of its conclusion that the state scheme as a whole severely burdens associational rights. *See id.* at 46 (stating that the delegate-selection stage "is of central importance to the entire electoral process because it effectively dictates the result of the convention").

2. The court's burden analysis was deeply flawed, in the main because it did not analyze New York's actual process for electing judges. What the court failed to appreciate was that under the New York system, a judicial candidate is not *supposed* to "access" the delegate election phase. On the contrary, the delegates are elected in their own stead, as

[3] The court reached this total by using a figure of 1,000 signatures per delegate candidate, on the assumption that the validity of signatures would be challenged and therefore the required 500 per candidate was actually insufficient. Pet. App. 13.

proxies unaffiliated to any one candidate, and the judicial candidate is supposed to address his campaigning to those unaffiliated delegates at the convention. As New York City Board of Elections Commissioner Douglas Kellner testified, " 'the idea that an individual candidate would go out and recruit delegate candidates and run delegates pledged to that candidate in the primary is not the system and it twists the design of the system on its head.' " Pet. App. 17.[4]

Thus, the Second Circuit's discussion of the "burden" on judicial candidates at the delegate-selection stage misses the point. Judicial candidates have no role at this stage and therefore can suffer no burden. The supposed burden of collecting 24,000 signatures is non-existent; the signature requirement is 500, and it falls on individual delegate candidates, not on judicial candidates. The same goes for the supposed burden of conducting a voter-education campaign across assembly districts and the supposed burden of recruiting sufficient committed delegates; state law does not contemplate that a judicial candidate would attempt either feat.

3. The Second Circuit's approach appears to stem from its notion that like some primaries, the delegate-selection stage of the New York Supreme Court election is designed to give rank-and-file voters a *direct* say in who the nominees of their party will be. *See* Pet. App. 17 (referring to the delegate-selection stage as an "open primary"); *id.* at 53 (stating that part of the basis for plaintiffs' claim is that "the regulations effectively *prevent a party member from voting for their preferred candidate*") (emphasis added). Proceeding from this premise, the court concluded that rank-and-file voters are not being given the direct say to which they are entitled, and that this is a constitutional infirmity, because once New York granted the rank-and-file voters an entitlement to choose nominees, it had to comport with First Amendment protec-

[4] Commissioner Kellner's testimony is supported by the findings of the District Court itself, which noted that with one exception, all defendants in this case agreed that "the system is not designed for challenger candidates to run their own slates of delegates." Pet. App. 168.

tions. *See id.* at 34-35 (citing *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 788 (2002)).

The problem with this analysis is that the premise is simply incorrect. The New York statutory scheme is not designed to give rank-and-file voters a direct say in choosing nominees. On the contrary, the plain text of the law, and the testimony of Commissioner Kellner, make clear that such voters are meant to have a say only in choosing unaffiliated delegates. Those delegates are the ones who get to pick the nominees. New York, in other words, chose to "insist that intraparty competition be settled before the general election" through a mixed scheme that arguably has more in common with the convention than with the primary. *American Party of Texas*, 415 U.S. at 781. "It is too plain for argument" that New York was entitled to do so. *Id.* The Second Circuit went too far in invalidating that choice—the oft-confirmed choice of a sovereign state[5]—and replacing it with another among the range of permissible election structures. Not only does such judicial overreaching intrude on the prerogatives of the states, but it has an unavoidable dilatory impact on political parties. If a state is sharply restricted in the types of nominee-selection processes it may permit, then parties by definition are identically restricted. The moment when a party chooses its standard-bearer is, after all, "the crucial juncture" at which the party's associational rights reach their zenith. *Tashjian*, 479 U.S. at 216.

4. The Second Circuit's analysis of the delegate selection stage is also faulty for another reason: The supposedly burdensome "requirements" it identifies do not appear in the text of New York's election law. This approach to ballot access questions has no support in this Court's jurisprudence. On the contrary, the cases have focused tightly on the terms of, and mechanisms created by, the challenged law. In

[5] As petitioners have noted, New York's Legislature adopted the current system in 1921 after a failed experiment with direct primaries, and has maintained the system for more than 85 years despite heated (and repeated) debate about whether it should be amended. *See* Pet. 6-8.

Bullock, for example, the Court struck down a Texas statute because the statute itself created the burden of paying exorbitant filing fees. 405 U.S. at 143. In *Williams* v. *Rhodes*, 393 U.S. 23 (1968), the Court struck down an Ohio statute because the statute itself created the burden of obtaining many thousands of signatures in order to earn a ballot position in presidential elections. *Id.* at 24. And in *Celebrezze*, the Court struck down Ohio's statutory early filing deadline because the statute itself flatly and unnecessarily excluded candidates who made a late decision to run for President. 460 U.S. at 795.

In this case, unlike *Bullock*, *Williams*, and *Celebrezze*, the supposed burdens highlighted by the Second Circuit appear nowhere in the invalidated statutes. This is highly problematic as a mode of judicial review. It is the law itself—and not how political actors operate within that law—that is under review. If state laws may be struck down because of elusive situational "burdens" not rooted in the statutory text, it is difficult to see what is to stop a court from striking down election laws because of, say, the advantages of incumbency, or the disincentive to challengers posed by major-party financial warchests. The Court should disapprove such freewheeling negation of state legislation and reaffirm that state laws may be struck down under the ballot access jurisprudence only if the *laws themselves* create the burdens.

5. Similarly, it should be noted that a central underpinning of the Second Circuit's "burden" finding is the fact that, in many cases, the only people who run for delegate slots are those party members—often party activists or insiders—recruited by the parties to do so. *See* Pet. App. 16-18. This lack of candidates creates the situation, lamented by the court, that many of the convention delegates end up being party activists, or individuals with strong connections to party leaders. If other citizens took it upon themselves to run for delegate positions, the conventions presumably would feature a smaller percentage of delegates who are party insiders, and any incentive for disfavored judicial candidates to try to run slates of committed delegates would disappear.

Here, again, the dynamic to which the Second Circuit objects is not created by state law. There is nothing to stop rank-and-file party members from running to be convention delegates. From all that appears in the record, their failure to do so stems from a simple lack of interest. As a result, the candidates picked by party insiders often win without a fight. But lack of citizen participation is not an unconstitutional burden on First Amendment rights, and in any event it is unclear why state law should be struck down to solve a problem state law did not create. Judicial review is not such a blunt instrument.

II. THE SUPPOSED "BURDEN" AT THE CONVENTION STAGE HAS NOTHING TO DO WITH STATE LAW ITSELF AND IS SIMPLY PARTY POLITICS IN ACTION.

For the reasons enumerated above, the Second Circuit was wrong to hold that New York law severely burdens associational rights at the delegate-selection stage. That leaves only the court's second finding—that unwarranted burdens also exist at the convention stage. But this finding, like the first, has no grounding in law. Not only is it again untethered from the actual text of the challenged statute, but the "burdens" the court perceived are in fact nothing more than ordinary party dynamics. If they render New York's convention scheme unconstitutionally burdensome, then various election systems across the country could be accused of being similarly burdensome.

A. The Court Below Found A "Burden" At The Convention Stage Because Delegates Often Nominate The Candidates Endorsed By Party Leaders.

Under New York law, the political parties hold their judicial nominating conventions in late September, one to two weeks after the judicial delegates are elected. Pet. App. 18 (citing N.Y. Elec. Law §§ 6-124, -126, -158(5)). At the conventions, any delegate may propose the nomination of any judicial candidate. Once this process is complete, the

delegates choose as many nominees as there are open Supreme Court positions in that district.

The Second Circuit noted that, during the period between the delegate elections and the convention, "any Supreme Court Justice aspirant * * * theoretically may lobby the delegates for support." *Id.* It also recognized that any delegate may support, and propose for nomination, any candidate he or she likes. *See id.* at 18, 28. It nonetheless found a severe burden on candidates at the convention stage.

First, it found that "the time frame for lobbying delegates is unrealistically brief," because the approximately two-week period between the delegate election and the convention is insufficient time for a judicial candidate to reach all of the delegates and alternates. *Id.* at 18. It reached this conclusion despite the fact that most delegate elections are uncontested, and in those cases the identities of the delegates are known—and lobbying may begin—as soon as delegate signature petitions are due in July. *See id.* In other words, the Second Circuit relied on a two-week time frame, even though the more typical time frame for lobbying delegates is at least two months.

Second, and more importantly, the court found that for many candidates, lobbying is fruitless in any event because "delegates do not exercise their own judgment when deciding which candidate to support. Instead, they endorse the choice" of local party leaders. *Id.* at 19. The court cited testimony that in at least some districts, the party leadership meets before the convention to select favored candidates, those selections are passed on to the convention delegates as recommendations, and the delegates usually nominate the recommended candidates, even though the party leadership issues no explicit commands to that effect. *See id.* at 19-22. The Second Circuit found that this system constituted a "severe" burden on judicial candidates' associational rights, *id.* at 45, even though it recognized that delegates do not have to, and do not always, follow the party leaders' wishes as to whom they should support. For example, the court noted that when respondent Margarita López Torres ran for a

Supreme Court nomination, two delegates at the judicial convention attempted to nominate her even though she had fallen out of favor with the local Democratic Party leadership. *Id.* at 28. And at the 2002 convention, López Torres received 25 delegate votes to her adversary's 66, even though she had not received party leaders' backing. Tr. 827-828.

B. The Second Circuit's Conclusion Is Not Only Untethered From State Law, But Chills Perfectly Acceptable Party Activity.

In short, the Second Circuit deemed the convention stage severely burdensome because (a) in a minority of cases, judicial candidates have a relatively short period of time to lobby convention delegates for support, and (b) often, when party leaders tell the delegates whom the leaders think should be nominated, the delegates nominate that person. The first of these conclusions is peripheral: It does not even apply as a factual matter in most elections, given the number of uncontested delegate races, and the Second Circuit explicitly acknowledged that this point was not central to its decision. *See* Pet. App. 18-19. And the second conclusion—namely, that party-leader influence over convention delegates renders the state's election law severely burdensome to candidates who do not enjoy the party leaders' imprimatur—is doubly erroneous.

1. As an initial matter, the burdens identified by the Second Circuit, like those it identified at the delegate-selection stage, again have nothing whatsoever to do with the state law under review. The state election rules have nothing to say about whether party leaders should recommend preferred candidates, or about whether delegates should choose to follow those recommendations. On the contrary, under state law the delegates have the freedom to support whomever they like, and judicial candidates have the freedom to lobby those delegates for support. In short, the Second Circuit struck down the law not because of what it said, but as a response to what the court saw as objectionably strong party leadership.

As noted in Part I, *supra*, there is no precedent for this approach: In every ballot access case relied on by the Second Circuit, this Court focused on the effect of the state provisions themselves in deciding whether or not the law placed unacceptable burdens on associational rights. *See, e.g.*, *Bullock*, 405 U.S. at 143; *Williams*, 393 U.S. at 24. This is as it should be, both because it is the law itself that is being challenged and because a contrary rule would give courts entirely too much power to strike down state election law to remedy perceived (and potentially ephemeral) electoral ills. Indeed, if the mere fact of top-heavy party influence could render an otherwise innocuous state law unduly burdensome, then the law could become constitutional, unconstitutional, and then constitutional again as a state party leader's power waxed and waned, even without a change in the statute. Such a rule would create a constitutional morass for future courts, which would be called upon to judge the constitutionality of state laws based not on their text, but on the private, mutable behavior of party officials.

2. Second, even if a court could strike down a state law to correct behavior that the state law does not endorse or encourage, the Second Circuit singled out the wrong behavior here. The mere facts that party leaders recommend preferred candidates to the convention delegates, and that the delegates often accept these recommendations, cannot constitute a severe burden on the associational rights of non-favored candidates. It is an indispensable element of party politics that party leaders organize the rank-and-file, set goals, and endorse candidates who best advance those goals; indeed, these are recognized associational rights of parties. *See, e.g.*, *Eu*, 489 U.S. at 216; *Tashjian*, 479 U.S. at 224. The fact that these party leaders have, in some elections, more than an equal say in who receives a nomination does not in any coherent sense mean that candidates for that nomination have been " 'exclude[d] * * * from the electoral process.' " *Celebrezze*, 460 U.S. at 793 (citation omitted) (quoting *Clements* v. *Fashing*, 457 U.S. 957, 964 (1982)).

Like its analysis of the election's first stage, this portion of the Second Circuit's holding appears driven by a certain conception of party decision-making—one in which every registered party member gets an equal say in choosing the nominee for every office. But this conception is not as a general matter a factually accurate description of political parties, nor is it constitutionally compelled. On the contrary, "[t]here are a number of respects * * * in which the parties conduct their affairs other than by giving equal attention to the preferences of * * * all party adherents." *Ripon Society* v. *National Republican Party*, 525 F.2d 567, 584 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976). If a state, through its elected legislature, decides to endorse a system—be it a convention, a caucus, or the blended system at issue here—that gives party leaders and activists a special role in choosing party nominees for certain positions, that is the state's prerogative.

a. The ahistorical nature of the Second Circuit's approach is perhaps best illustrated by the fact that it appears to require the conclusion that the presidential nominating conventions from the mid-19th century up to at least 1972, when prepledged delegates became the norm, were unconstitutional. As one scholar has noted, "[n]ational party conventions prior to 1972 were generally under the control of state party leaders," who held "power * * * over delegates[.]" AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY, AND POLITICAL CHANGE 14 (Harvey L. Schantz ed., 1996) (hereinafter, "Schantz"). As recently as 1968, "when Hubert Humphrey won the Democratic Party nomination for president, his major strategy was the courtship of party leaders. He did not even enter a single primary." *Id.*

Indeed, the Court of Appeals for the District of Columbia Circuit has emphasized this very point. In *Ripon Society*, the court noted that "administrative decisions" such as "appointments of subcommittees and their chairmen, delegate seating and accommodations, [and] media coverage" played a "crucial role" in the outcome of the 1968 Democratic Convention. 525 F.2d at 583 n.51 (citing COMMISSION ON

THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, THE DEMOCRATIC CHOICE 40-43 (1968)). It further observed that in many states, as recently as 1968, the selection of delegates to the presidential nominating convention was "made not in a primary election but through a series of local, county, and state caucuses and conventions. * * * [O]ften voter participation [was] so slight as to make the selection process one virtually (or even officially) of appointment by party officials." *Id.* at 584. It is difficult to see how such a system would pass muster under the Second Circuit's approach.

b. The problems created by the opinion below are not limited to historical curiosity, however. Quite the contrary—election laws in a number of states would seem to be vulnerable to the same objections.

In Virginia, for example, state law provides for primaries for nomination as to certain offices, but as to many others, it permits "[t]he duly constituted authorities" of the state or local party to decide "the method by which a party nomination for that office shall be made." Va. Code Ann. § 24.2-509. The major parties take advantage of this provision to nominate candidates by convention. In Loudoun County, the County's Republican Party holds a convention at which delegates nominate the party's candidates for "Chairman, Board of Supervisors; Sheriff; Commissioner of the Revenue; Treasurer; Clerk of the Circuit Court; and Commonwealth's Attorney."[6] One does not even have to be elected to serve as a delegate to this convention; instead, the delegates are simply those people who register to serve in the capacity.

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[6] *See Call for a 2007 Convention of the Loudoun County Republican Party*, *available at* http://www.loudoungop.com/library/2007convention-call-draft.pdf. The county party's 2007 call has been challenged by the state party as violative of party rules, but the alleged violations are unrelated to the issues presented here. *See* Michael Laris, *County GOP Accedes to Ruling*, Washington Post (Apr. 15, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041302589.html.

If more people register than there are slots, elections are held, but the delegates appear in any event to be uncommitted to candidates.[7] This system is used in other Virginia counties as well.[8]

Similar convention mechanisms are in place in other states. In Indiana, state law obliges certain political parties—those whose nominee received at least two percent but less than 10 percent of the votes cast for secretary of state in the most recent election—to "nominate the party's candidate for a local office at a county convention of the party." *See* Ind. Code Ann. § 3-10-2-15. Indeed, the convention system is used in Indiana not just for local elections, but also for statewide elections for lieutenant governor, secretary of state, attorney general, and other positions. *Id.* § 3-8-4-2. The delegates to the statewide convention apparently are not affiliated with particular candidates, and the parties have at times had trouble finding enough delegates to fill all the convention slots.[9] In South Carolina, likewise, state law permits parties to nominate candidates for county offices *via* a county convention; the delegates to that convention, who again appear to be unaffiliated to candidates, are elected by county political "clubs." S.C. Code Ann. § 7-9-70. And these laws are hardly outliers. Other states have similar convention provisions applicable to local, and in some cases state, elections. Additional states still employ the caucus system for certain nominations, including that of the party's candidate for President of the United States. *See, e.g.*, Scott R. Meinke *et al.*, "State Delegate Selection Rules for Presidential Nominations, 1972-2000," 68 JOURNAL OF POLITICS 180, 182 (Feb. 2006) (noting that "despite the well-

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[7] *See Call for a 2007 Convention, supra* note 6.

[8] *See, e.g.*, Web Site of the Buchanan County Democratic Committee, *available at* http://buchanandemocrats.com (noting that "Buchanan County Democrats traditionally select candidates by convention for local office," including the offices named above in connection with Loudoun County).

[9] *See* Niki Kelly, *Minus Decisions, GOP convention to be uneventful*, Fort Wayne Journal-Gazette (June 18, 2006).

documented trend toward primaries, nearly 25% of the states ran caucuses during the 2000 election season").

It is true, of course, that there is no record evidence that party leaders dominate, or strongly influence, the nomination processes at any or all of these conventions or caucuses. It would be difficult to believe, however, that such is not the case in at least some states and localities. After all, scholars and political observers long have recognized that caucus and convention attendees at every level "are stronger party identifiers * * * than primary voters," making them "precisely the individuals whom we might expect would be receptive to the party leadership's appeals to support one candidate or another and to advance the ideological goals of the party." *Id.*; *see also* Schantz, *supra*, at 15 (noting that "power and control over delegates [to the national conventions] were historically held by state party leaders"). To the extent this is so, the Second Circuit's approach would call into question the constitutionality of other state election mechanisms.

The Second Circuit, in sum, was led astray by its unrealistic, and unnecessarily cramped, view of political parties. In one fell swoop, the court's analysis of the convention stage of New York's judicial election managed to give impermissibly short shrift both to the state's power to structure elections, *see Bullock*, 405 U.S. at 141, and to parties' rights to endorse candidates and structure their internal association as they see fit, *see Eu*, 489 U.S. at 216.

III. THE SECOND CIRCUIT ERRED IN BASING ITS "SEVERE BURDEN" FINDING IN PART ON ONE-PARTY DOMINANCE.

The Second Circuit erred yet again when it based its "severe burden" finding in part on the fact that in certain of New York's judicial districts, one of the two major parties is currently dominant. *See* Pet. App. 70. This Court should clarify that the dominance *vel non* of a party in a given electoral district has nothing to do with the ballot-access burden analysis. Not only is there no support for the Second Circuit's approach in this Court's cases, but such a rule would invite further litigation the aim of which would be to strike down democratically-crafted election laws based on such "burdens."

1. The idea that one-party dominance has some relevance to the burden analysis first crops up in the opinion of the District Court. That court noted that "nearly all Supreme Court Justice 'races' in New York State are overwhelmingly controlled by one party—the Democrats in New York City and the Republicans in most of the rest of the state." Pet. App. 161. It went on to state that "[p]articularly where, as here, there are established areas of one-party rule, voters and candidates have a right to participate meaningfully in the nomination process, which includes a realistic opportunity to challenge the selections of party leadership." *Id.* at 163.

The Second Circuit picked up this thread. It first recounted "evidence * * * that because one-party rule is the norm in most [New York] judicial districts, the general election is little more than ceremony. Over a 12-year period between 1990 and 2002, almost half of the State's elections for Supreme Court Justice were entirely uncontested * * *." Pet. App. 23. The court made repeated subsequent reference to this fact, *see, e.g.*, *id.* at 32, 40, 46, and finally made quite clear that this perceived one-party dominance was a key cog in its "severe burden" holding:

> All of the evidence presented, and accepted by the District Court, reduces to this bottom line: through a byzantine and onerous network of nominating phase regulations *employed in areas of one-party rule, New York has transformed a de jure election into a de facto appointment.* * * * *Under these circumstances*, the District Court properly concluded that New York's judicial nominating process severely burdens the associational rights of candidates and voters alike. [Pet. App. 69-70 (emphases added).]

Respondents, in turn, latched onto this theme in their brief opposing the petition for certiorari. Respondents emphasized in their opening paragraph that "because most parts of the State are dominated by a single party, these undemocratic nominations dictate the outcome of the general election in all but a few instances." Brief in Opposition at 1. They went on to reiterate the Second Circuit's one-party rule thesis throughout their argument. *See id.* at 11, 24.

2. Notably absent from all of this argumentation is any explanation of *why* a party's dominance in certain electoral districts is, or should be, relevant to the question whether a state's laws burden candidates' right to seek *their party's nomination* (or the concomitant right of voters to associate with the candidate of their choice). This, no doubt, is because the idea does not stand up to examination. Indeed, it is a *non sequitur*: Since the right at issue is that of "candidate access to the primary ballot," *Bullock*, 405 U.S. at 143, by definition, any burden on that right must operate at a time when the candidate could still be nominated—that is, prior to the selection of the party's nominee. Otherwise, it has nothing to do with the candidate's ability to seek the nomination free of excessive burdens.

Indeed, the notion that a competitive general election—*i.e.*, one in which the two major parties both stand a fair *ex ante* chance of winning—has anything to do with burdens on

associational rights betrays a failure to define the nature of the rights involved. If those rights have any definable content, they must be tied to specific candidates, and the voters who desire to vote for those candidates. And it is easy to see that it could not make any difference to a specific candidate—say, for example, a Democrat from New York City—whether or not the opposing party is competitive in her district. It would change nothing for *that candidate*, or for the voters who desired to support her, if the Republican Party had a fighting chance in the general election. After all, the Democratic candidate could hardly be expected to compete for the Republican nomination—indeed, it is difficult to see how the candidate could do so even if she wanted to, given that the conventions for both parties occur at the same time. In short, reliance on one-party dominance in the burden analysis untethers that analysis from the actual rights of actual people.

To the extent the notion posited by the Second Circuit (and by respondents) makes any sense at all, it would have to be as part of a broader argument, unarticulated below—that the general election matters because a would-be nominee who fails to win the nomination nonetheless may participate by seeking a spot, any spot, on the general election ballot. But this argument also cannot bear weight, for two reasons. First, this Court explicitly has stated that the availability of access to the general election ballot is irrelevant to the calculus of whether a candidate's right to access the *nomination* phase is burdened. *See Bullock*, 205 U.S. at 146-147 (rejecting the notion that the power to petition on to the ballot as an independent may save a burdensome primary scheme because "we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations * * *."). And second, even if ability to participate in the general election *were* relevant to the analysis of nomination-stage burdens, that would not cut in favor of a "severe burden" finding on these facts: Judicial candidates in New

York indeed have the option of participating in the general election as independent or write-in candidates, as the Second Circuit itself emphasized. Pet. App. 54. Such a chance to participate is what the Constitution requires. *See Celebrezze*, 460 U.S. at 793 ("[B]allot access cases * * * focus on the degree to which the challenged restrictions operate as a mechanism to *exclude certain classes of candidates from the electoral process*.") (emphasis added). If the Second Circuit believes something more is required, then it is attempting to enshrine either a right to be a major party nominee or a right to win, despite its protestations to the contrary. *See* Pet. App. 45. Such is not the rule.

3. Not only does it make little sense to consider one-party dominance in the burden analysis, but the approach has no basis in Supreme Court precedent. The courts below cited two cases—*United States* v. *Classic*, 313 U.S. 299 (1941), and *Bullock*, 405 U.S. 134—in defense of their approach. *See, e.g.*, Pet. App. 40-41. But neither of those cases supports the proposition. *Classic* discussed one-party dominance only in considering whether a primary constituted state action; it concluded that the primary *was* state action, in part because exclusionary nominating-phase regulations in a one-party state may well "operate to deprive the voter of his constitutional right of choice." 313 U.S. at 319. The RNC certainly does not contest that well-established state-action principle; it simply has nothing to do with this case. *Cf. Georgia* v. *National Democratic Party*, 447 F.2d 1271, 1276 (D.C. Cir.) ("Of course, state action is not in itself a sufficient basis on which to premise the grant of affirmative relief sought by appellants."), *cert. denied*, 404 U.S. 858 (1971). It makes perfect sense to say that a primary in a one-party state—one in which the party itself *is* in some sense the state and can make the rules—constitutes state action. But it is a very long and illogical step, and one never taken by the Court, to go from reliance on one-party dominance to find state action (and thus bring the case within the reach of the

Fourteenth Amendment) to reliance on one-party dominance to find a burden on a candidate's associational right at the nomination stage.[10]

Likewise, *Bullock* did not purport to hold, or even suggest, that one-party dominance could somehow burden a candidate's rights at the nomination stage. The *Bullock* Court mentioned one-party dominance only in passing, and only to reject a litigant's argument that burdens at the primary stage were rendered *less* severe because they could be avoided by bypassing the primary. 405 U.S. at 146-147. It is a compound logical error to suggest, as the Second Circuit did, that the converse of a proposition this Court rejected is somehow the law.

4. But the idea that one-party dominance of an electoral unit can burden a candidate's, or a voter's, associational rights is not just illogical and unsupported by precedent—it also threatens democratically-enacted election laws. If lack of political competitiveness in a given electoral unit constitutes a burden for purposes of the ballot access analysis, or makes it substantially easier to conclude that other obstacles add up to a "severe" burden, then the deck is stacked against election laws in the substantial swaths of the country where one major party or another dominates at a given time.

There are hundreds, if not thousands, of electoral districts in the country where one party holds or has held sway for some stretch of time, be it years or decades. Democrats, of course, dominated nearly all of the South for well over half a century after Reconstruction; in 1958, the high point of the "Solid South," Democrats held 95 percent of the seats in

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[10] This is especially so where the supposed one-party dominance is not even statewide. Here, since Republicans hold sway in some New York electoral districts and Democrats in others, there is no reason to think one party is pulling all the strings in the state legislature. *Cf. Burdick* v. *Takushi*, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting).

Southern state legislatures.[11] Today, while no entire region votes in a bloc to that extent, there are untold numbers of districts where the nominee of one party or another has no realistic chance to win. Indeed, if one adopts the Second Circuit's approach and deems unopposed elections a telltale sign of partisan dominance, *see* Pet. App. 23, the issue is even quantifiable: In 2004, 38.7 percent of state legislative races in the United States were not contested by one of the two major parties, and in at least three states—Arkansas, Florida, and South Carolina—the percentage of uncontested races exceeded 70.[12] And while not all of those unopposed races are a function of one-party dominance, there is no dispute that many are.

In Texas, to take just one example, Democrats dominated the state until 1980, and during that period judicial elections "tended to be uncontested, low-key affairs."[13] Between 1980 and 1996, as the Republican Party rose, far fewer seats were uncontested because the "viable political alternative encouraged vigorous party competition for all offices, including seats on the state bench."[14] In recent years, as Republicans have achieved dominance, a decrease in contested races again has followed: In 2004, two of every three judicial seats were uncontested.[15]

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[11] National Conference of State Legislatures, *Democratic Blip in the South*, Nov. 8, 2006 (*available at* http://ncsl.typepad.com/the_thicket/2006/11/rare_democratic.html).

[12] The Center for Voting and Democracy, *Uncontested State Legislative Races 2002-2004*, *available at* http://www.fairvote.org/?page=717.

[13] G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1454 (2003).

[14] Tarr, *supra* note 13, at 1454-55.

[15] Kyle Cheek, *Reconciling Normative and Empirical Approaches to Judicial Selection Reform: Lessons From a Bellwether State*, 68 ALBANY L. REV. 577, 583 (2005).

Accepting the Second Circuit's approach, nomination-stage ballot access rules in all such states and localities are subject to potential invalidation. Indeed, under the court's approach ballot access rules in State A, where one party currently dominates, may be held to "severely burden" associational rights, while identical rules in State B, where the parties are more closely balanced, are deemed acceptable. This cannot be, not just because it would be an administrative nightmare but because it creates an all-too-convenient lever for judicial discretion. The Court should not endorse a rule that enhances to such an extent the power of courts to prevent states, and their elected legislators, from organizing elections as they see fit.

5. Furthermore, the burden the court below saw as a result of one-party domination is, once again, mutable and subject to the vagaries and shifting sands of political fortune. This flaw runs through the court's opinion. *See supra* at 12, 15. Instead of focusing on state law itself and the mechanisms that law creates, the court vents its disapprobation on political and social factors—one-party dominance, powerful local political leaders, citizen disinclination to run for delegate slots—that are not enshrined in law and that could change with time, as they have in so many states. This approach to judicial review can only mean increased, unnecessary, and inconsistent judicial oversight of state election law, and a concomitant abridgement of the long-held freedoms of America's political parties to organize as they see fit, within the bounds of law.

CONCLUSION

For the foregoing reasons, and those in petitioners' briefs, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LOPEZ TORRES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amicus curiae addresses the following question only:

Whether a New York State election scheme that, in practice, has placed control over the selection of judges in the hands of the leader of the political party that is dominant within each judicial district violates the First Amendment rights of voters and would-be judicial candidates.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. NEW YORK'S ELECTORAL SYSTEM IMPLICATES 1ST AND 14TH AMENDMENT RIGHTS 9

A. The Electoral System Implicates the Rights of Individuals to Associate for the Advancement of Political Beliefs and the Rights of Qualified Voters to Cast Votes Effectively 9

B. Regardless Whether Rank-and-File Party Members Have a First Amendment Right to Influence Party Nominee Selection, They May Not Be Shut Completely Out of the Process 13

C. Petitioners Have Failed to Meet Their Burden of Proving That the Severe Burdens Imposed on Respondents' Associational Rights and Voting Rights Serve a Compelling Interest in a Narrowly Tailored Manner 16

Page

II. THE DECISION BELOW POSES NO THREAT TO THE ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases:

American Party of Texas v. White,
415 U.S. 767 (1974) 19
Anderson v. Celebrezze,
460 U.S. 780 (1983) 11, 12
Ashcroft v. ACLU,
542 U.S. 656 (2004) 16
Bose Corp. v. Consumers Union of U.S.,
466 U.S. 485 (1984) 6
Bullock v. Carter,
405 U.S. 134 (1972) 11, 12, 15
Burdick v. Takushi,
504 U.S. 428 (1992) 10, 15
California Democratic Party v. Jones,
530 U.S. 567 (2000) 11, 15
Clingman v. Beaver,
544 U.S. 581 (2005) 18
Easley v. Cromartie,
532 U.S. 234 (2001) 16
Gonzalez v. State of Arizona,
485 F.3d 1041 (9th Cir. 2007) 1
Harper v. Virginia State Bd. of Elections,
383 U.S. 663 (1966) 6
McCreary County, Ky. v. ACLU,
545 U.S. 844 (2005) 16
Morse v. Republican Party of Virginia,
517 U.S. 186 (1996) 20
Neil v. Boggers,
409 U.S. 188 (1972) 7
Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 10, 17

Page(s)

Smith v. Allright,
321 U.S. 649 (1944) 11
Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1986) 20
Terry v. Adams,
345 U.S. 461 (1953) 13, 14
United States v. Classic,
313 U.S. 299 (1941) 13

Statutes and Constitutional Provisions:

U.S. Const., amend. i ..... *passim*

U.S. Const., amend xiv, Equal Protection Clause .. 5, 9, 11

Voting Rights Act of 1965, § 5 20

N.Y. Election Law § 6-106 ..... 3, 5

N.Y. Election Law § 6-124 ..... 3, 5

Miscellaneous:

Fed.R.Civ.P. 52(a) 16

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government.

In particular, WLF has regularly appeared in this and other federal courts in cases raising First Amendment issues regarding the conduct of elections. *See, e.g., Gonzalez v. State of Arizona*, 485 F.3d 1041 (9th Cir. 2007). WLF strongly supports both the First Amendment right of individuals to associate for the advancement of political beliefs and the First Amendment rights of qualified voters, regardless of their political persuasion, to cast their votes effectively.

WLF has long advocated in support of the First Amendment rights of political parties and believes that they should be granted considerably leeway in the manner they go about choosing their standard bearers for general elections. For example, WLF supports the right of a party to insist that the selection of candidates be limited to those affiliated with the party. However, contrary to the views of Petitioners and their *amicus* supporters, WLF does not believe that the Second Circuit decision poses any threat to political parties' First Amendment associational rights. The district court injunction

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

is directed at New York election laws, not at the activities of party officials.

WLF supports the selection of state court judges through the electoral process. Because common law courts possess the power to create new law, elections provide an appropriate check on the use of that power by state court judges. WLF also believes that states have a legitimate interest in shielding judicial selection from some of the excesses of the electoral process. But the First Amendment does not permit a State to advance that interest in the manner New York has employed: establishing a system that effectively places control of the electoral process in the hands of a small number of political party leaders. The judicial election systems adopted by numerous other States demonstrate that it is possible to craft measures designed to eliminate excessive partisanship from the electoral process without trampling on First Amendment rights.

WLF takes no position regarding the appropriate judicial remedy for the First Amendment violations identified in this case. WLF is filing this brief with the consent of all parties. Copies of the consent letters have been lodged with the Court.

STATEMENT OF THE CASE

Petitioners challenge the decision of a federal district court granting a preliminary injunction against New York State's system of electing Justices to its Supreme Court. The Second Circuit upheld the district court's findings of fact as "not clearly erroneous," Pet. App. 10, and none of the Petition's Questions Presented challenge any of those factual findings. Accordingly, the findings (*id.* 96-150) should be accepted as accurate for purposes of this appeal.

WLF sets forth herein only a brief summary of those findings. Since 1846, New York law has provided for the popular election of Supreme Court Justices. In 1921, New York eliminated direct primaries as the means of selecting party nominees; thereafter, nominees have been chosen by judicial district conventions. New York Election Law § 6-106. There are 12 judicial districts in the State, each with its own conventions for each major party. Delegates are chosen for the conventions by means of "delegate primaries" open to all party members. New York Election Law § 6-124. To gain a spot on the delegate primary ballot, a party member must gather (during a 37-day period) 500 valid signatures from party members residing in his assembly district. Pet. App. 12.[2]

In actual operation, the selection of delegates "is dominated by party leadership," and claims that a candidate seeking her party's nomination "who lacks party leader support can clear all the hurdles necessary to elect supportive delegates to the convention" are "unsupportable." *Id.* 100. The district court also rejected as "unsupportable" claims that "challenger candidates need not elect their own supportive delegates because they can lobby the delegates elected by their party's machinery"; the court found that "[t]he structural and practical impediments" to doing so are "insurmountable." *Id.* The court found that nominating conventions are "perfunctory, superficial events" and that they do not actually determine the parties' nominees but rather merely "formally endorse determinations made elsewhere." *Id.* 125. The district court determined that the general elections are a "formality" because

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[2] This nominating process is unique to Supreme Court Justices. The State conducts open primaries with respect to *all other* elective offices, and individuals can gain a spot on the primary ballot for all such offices by gathering a specified number of signatures. Pet. App. 98.

there are virtually never any contested elections. *Id.* 129. In most of the 12 judicial districts, the candidate of the dominant party (either the Republicans or the Democrats) always or virtually always wins. *Id.* "In districts that are not dominated by a single party, the Democratic Party and the Republican Party essentially divvy up the judgeships through cross-endorsements." *Id.* 130.

The district court summarized its factual findings as follows:

> [T]he plaintiffs have demonstrated convincingly that local major party leaders – not the voters or the delegates to the judicial nominating conventions – control who becomes a Supreme Court Justice and when. The highly unusual processes by which that extremely important office is filled perpetuate that control, and deprive the voters of any meaningful role.

Id. 95.

Plaintiffs, a group of New York voters, aspirants to the Supreme Court, and Common Cause/NY, filed a challenge to the system of selecting party nominees for the Supreme Court, alleging that the system violated the First Amendment and the Fourteenth Amendment's Equal Protection Clause, both facially and as applied to them. The complaint alleged that the system placed severe and unjustified burdens on candidates seeking to challenge the candidate backed by the party leader, deprived rank-and-file party members of their rights to associate to choose party candidates, and denied all voters their rights to vote effectively.

In January 2006, the district court granted a preliminary injunction against continued use of the challenged election

system. *Id.* 93-185. Specifically, the district court enjoined continued enforcement of New York Election Law §§ 6-106 and 6-124. The court found that the system imposed a "severe" burden on Respondents' First Amendment rights. *Id.* 172. It further found that none of the interests that, according to Petitioners New York State Board of Elections, *et al.* (collectively, "the Board"), were being served by the electoral system were sufficiently compelling to justify the burden imposed on Respondents' rights. *Id.* 172-79.[3] In light of its First Amendment ruling, the court did not reach Respondents' equal protection claims. *Id.* 185.

The result of the district court's preliminary injunction was to put in place the State's default position for the selection of party nominees: a primary election open to all party members submitting the requisite signatures. The district court made clear, however, that it was not seeking to impose a new nominee selection procedure on the State; rather, it stressed that the final choice of a new procedure was up to the New York legislature, and it stayed its injunction pending appeal to provide New York an opportunity to devise a new plan of its own. *Id.* 183-84.

The Second Circuit unanimously affirmed. *Id.* 1-85. The appeals court held that the district court did not abuse its discretion in finding that New York's election system severely burdened Respondents' First Amendment rights and, as such, should be enjoined because it was not narrowly tailored to serve a compelling state interest. *Id.* 85. In making that determination, the appeals court relied on the district court's findings of fact, which were made following a 13-day hearing

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[3] The court also found that Respondents had established that they would suffer irreparable harm in the absence of an injunction. *Id.* 150-52.

and which the appeals court concluded were not "clearly erroneous." *Id.* 10.[4] The appeals court rejected the Board's arguments that the First Amendment is inapplicable to New York's nominating process, *id.* 37-41, and, alternatively, that the First Amendment guarantees, at most, *access* to the nominating process, not a realistic opportunity for success. *Id.* 41-46. The court also rejected the Board's arguments that the First Amendment associational rights of political parties are sufficiently strong to permit a party, if it so chooses, to place control of the nominating process in the hands of party leaders. *Id.* 49-54.

SUMMARY OF ARGUMENT

If New York were to adopt a law declaring that Supreme Court Justices are to be popularly elected, but only the leaders of the most powerful political party within each judicial district are allowed to vote in that election, the law would surely amount to an unconstitutional abridgement of voting rights. Such a severe limitation on the franchise would be subjected to the strictest of constitutional scrutiny, and the Court has never recognized a state interest sufficiently compelling to justify voting abridgement of that magnitude. *See, e.g., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966). Based on the detailed (and uncontested) factual findings of the district court, the New York election system

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[4] The appeals court also conducted its own "'independent investigation of the whole record'" to assure that the district court judgment did not "'constitute a forbidden intrusion on the field of free expression.'" *Id.* 58 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)). After conducting that review, the court concluded, "We cannot say that the District Court clearly erred in finding that New York's judicial nominating scheme imposes severe burdens on the associational rights of voters and candidates." *Id.* 59.

has exactly the same effect on voting rights as the hypothetical election statute described above. Because of those severe effects on First Amendment rights, the New York election system was properly subjected to strict scrutiny by the courts below. The courts below also properly held that the interests identified by the Board in support of the election system were not sufficiently compelling to justify the State's infringement of Respondents' First Amendment rights.

The Court has explained that statutes imposing voting restrictions affect two interwoven strands of constitutionally protected rights: the First Amendment right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. The factual findings of the district court make clear that both strands are severely affected by New York's system of electing Supreme Court Justices. The district court found that the party leader chooses his party's candidate and that rank-and-file party members who support a different candidate are "never" successful in their challenges to the party leader's choice – regardless of how large a percentage of party members support the challenger. Pet. App. 171. The role of the party leader is not written into the challenged election statutes; but in evaluating the burdens an election system imposes on voters, the constitutional analysis requires a detailed analysis of how the system actually functions in addition to an analysis of the statutes themselves. Here, as the district court found, the inevitable practical effect of New York's statutory scheme for selecting Supreme Court nominees is to place exclusive control of the nominating process into the hands of the party leader.

There is often nothing inherently unconstitutional about political party rules that grant a small group of party leaders authority to select party nominees. After all, if a group of

party members is dissatisfied with their party leader's choice of candidates and (as is often the case) any attempt to remove the leader from office would take too long to allow for the candidate choice to be overturned, they can exercise their associational rights by placing their preferred candidate on the ballot as an independent or as the candidate of a different political party. But, as the district court found, this procedure not a realistic option in Supreme Court races: in virtually every case, the winner of the dominant party's convention is the automatic winner of the general election. Thus, the New York electoral system, by denying rank-and-file members *any* effective access to the candidate-selection process, imposes a severe burden on the associational and voting rights of party members. Under those circumstances, the burden of proof falls on the Board to demonstrate that the electoral system serves a compelling government interest in a narrowly tailored manner. The Board did not come close to meeting that burden in the district court; accordingly, the district court did not abuse its discretion in granting a preliminary injunction. In particular, the Board failed to demonstrate that the State's interest in avoiding excessive partisanship in judicial elections could not be satisfied by means that impose far less burdens on voting rights of rank-and-file party members.

The decision below poses no threat to the associational rights of New York's political parties. The district court issued an injunction against State officials only; political party officials are not required to do anything. The parties fault the district court for allegedly ordering the Board to conduct primary elections for the selection of party nominees; but even if that were an accurate description of the district court's injunction, it would not infringe on the parties' associational rights because this Court repeatedly has made clear that States may *require* parties to select their nominees through primaries in which all party members are entitled to participate. WLF

would agree, *as a policy matter*, that political parties generally should be granted broad leeway in selecting a method for choosing candidates, but they have no constitutional right to select their candidates through a convention system. Nor can the district court fairly be said to have prohibited all convention systems; rather, it merely prohibited one convention system that imposed particularly severe burdens on constitutional rights. Nothing in the decisions below suggests that similar election systems would be problematic if (contrary to the facts in this case) the general election provided voters and candidates with an effective alternative means of exercising association rights.

ARGUMENT

I. NEW YORK'S ELECTORAL SYSTEM IMPLICATES 1ST AND 14TH AMENDMENT RIGHTS

A. The Electoral System Implicates the Rights of Individuals to Associate for the Advancement of Political Beliefs and the Rights of Qualified Voters to Cast Votes Effectively

As the uncontested factual findings of the district court indicate, rank-and-file party members are deprived of "any meaningful role" in the selection of their party's Supreme Court Justice nominees. Pet. App. 95. Although New York has established a primary election process – involving the election of delegates to a convention where nominees supposedly are to be chosen – the system is actually "designed to freeze the political status quo, in which party leaders, rather than the voters, select the Justices of the Supreme Court." *Id.* 183. Given those findings, it is difficult to argue that the

district court abused its discretion in determining that the ballot access burdens imposed in this case are "severe." *Id.* 172.[5]

Petitioners nonetheless insist that a party's selection of its nominees operates in a First Amendment rights-free zone. *See, e.g.*, Brief of Petitioners New York State Board of Elections, *et al.*, ("Board Br.") at 14 ("[T]his Court has never held that the *First Amendment* grants to candidates a right of unfettered access to [party nomination] contests. . . . And with good reason: a political party is not a traditional public forum.") (emphasis in original). But while a party itself is not a public entity, a state-run primary election quite clearly is a public affair subject to all the constraints on state action imposed by the Constitution. Having mandated the use of elections to select Supreme Court nominees and having chosen to conduct primary elections in connection with the parties' selection of judicial nominees, New York is obligated to ensure that that selection process complies with constitutional rights. As the Court recently explained, although States are entitled to dispense with judicial elections altogether, "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to that role." *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (internal citation omitted).

In a number of cases, the Court has invalidated state-mandated primary election procedures that violated constitutional rights, in each case without regard to whether judicial intervention entailed imposing limits on a political

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[5] When, as here, the burden imposed by the State on voting rights is severe, the burden of proof imposed on the State is more exacting: "the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

party's freedom to select nominees as it saw fit. *See, e.g., Bullock v. Carter*, 405 U.S. 134 (1972) (invoking Equal Protection Clause to strike down excessive primary election filing fees); *Smith v. Allright*, 321 U.S. 649 (1944) (invoking Fifteenth Amendment to prohibit political party from excluding non-whites from voting in its state-run primary election); *cf. California Democratic Party v. Jones*, 530 U.S. 567, 573 n.5 (2000) (political parties may not exclude voters from its primaries if doing so "violates some independent constitutional proscription," such as First Amendment associational interests). Petitioners have not articulated any coherent theory regarding why primary elections should be subject to these other constitutional protections but not to the First Amendment.

The Court has explained that statutes imposing voting restrictions affect two interwoven strands of constitutionally protected rights: the First Amendment right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). The factual findings of the district court make it plain that both strands of protected rights are implicated by the New York election system. By adopting a system "designed to freeze the political status quo, in which party leaders, rather than the voters, select the Justices of the Supreme Court," Pet. App. 183, New York has made it impossible for rank-and-file party members to associate for the purpose of electing their favored candidate and to cast their vote effectively for that candidate.

Noting that New York law makes no reference to party leaders, Petitioners insist that the enormous power wielded by party leaders in selecting judicial nominees is not a function of New York's electoral system but rather is simply an example

of "politics in action." But that assertion is directly contrary to the findings of the district court, which found that the system is "designed" to ensure that parties leaders can control the selection of Supreme Court Justices, *id.* 183; in other words, the system is perpetuated to ensure that the anticipated "politics in action" reaches the desired result.

By reaching its findings based on an examination of how the election system has actually functioned over the course of many years (rather than focusing solely on the statutory language), the district court was proceeding precisely as this Court has instructed. *See, e.g., Bullock*, 405 U.S. at 143 ("In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters."). As the Court explained in *Anderson*, "Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." *Anderson*, 460 U.S. at 789. Instead, courts must engage in a detailed analytical process that includes consideration of "the character and magnitude of the asserted injury" to constitutional rights; "identify[ing] and evaluat[ing] the precise interests put forward by the State as justifications for the burden imposed" by the challenged provision; and "consider[ing] the extent to which those interests make it necessary to burden the plaintiffs' rights." *Id.* The Court added, "The results of this evaluation will not be automatic; as we have recognized, there is no substitute for the hard judgments that must be made." *Id.* (citation omitted). The district court conducted precisely the sort of detailed analysis mandated by *Anderson*, and its resulting factual findings – regarding the severity of the burden imposed on Respondents' associational rights and the interests asserted by New York as justifications for the burdens imposed – are not subject to challenge in this Court.

B. Regardless Whether Rank-and-File Party Members Have a First Amendment Right to Influence Party Nominee Selection, They May Not Be Shut Completely Out of the Process

Petitioners argue alternatively that even if the First Amendment affords some protection to the associational rights of rank-and-file party members, those rights are satisfied when, as here, the plaintiffs have "reasonable access to the general election ballot." Board Br. 15. Regardless whether providing party members with "reasonable access" to the general election ballot (while simultaneously denying them all influence over the party's nominee selection) could *ever* satisfy those members' associational rights, it does not do so here, where (as found by the district court) the general election is a mere "formality" because there are virtually never any contested elections. Pet. App. 129.

This Court has repeatedly held that party members may not be excluded from the process by which party nominees are selected in those instances in which that nominee is virtually certain to win the general election. *United States v. Classic*, 313 U.S. 299, 318 (1941); *Terry v. Adams*, 345 U.S. 461 (1953). *Terry* is closely analogous to Respondents' case. It involved a challenge to the racially exclusionary practices of a private political group in Texas known as the Jaybird Democratic Association. Although the Jaybirds had no official status, they effectively controlled all elections in Fort Bend County, Texas. Whites in the county agreed that the winner of the whites-only "primary election" conducted by the Jaybirds would be the sole candidate in the Democratic Party primary – thereby assuring his ultimate election. The Court ruled that the exclusion of black voters from the Jaybird primary violated the Fifteenth Amendment, even though the Jaybirds themselves were not state actors and even though black voters

were entitled to participate in both the Democratic primary and the general election. *Terry*, 345 U.S. at 465-66 (plurality). Key to the Court's decision were its findings that the Jaybird primary was "[t]he only election that has counted in this Texas county for more than 50 years,"and that the Democratic primary and general election were "no more than the perfunctory ratifiers" of the choice already made in the Jaybird primary. *Id.* at 469.

Terry is fatal to the Board's claim that New York's provision of reasonable access to the general election ballot satisfies Respondents' First Amendment concerns. In light of the district court's factual finding that access to the New York general election ballot provides no benefit because the general election for Supreme Court seats is a meaningless "formality," *Terry* dictates that Respondents must be provided a right of meaningful participation in the process of selecting their parties' nominees. As in *Terry*, the Board may not avoid constitutional objections by asserting that any violation of Respondents' associational rights is the product of private actions. To hold otherwise would be to permit New York to effectively shut Respondents out of the electoral process.

WLF believes that there is often nothing inherently unconstitutional about political party rules that grant a small group of party leaders authority to select party nominees. After all, if a group of rank-and-file party members is dissatisfied with their party leader's choice of candidates and (as is often the case) any attempt to remove the leader from office would take too long to allow for the candidate choice to be overturned, they can exercise their associational rights by placing their preferred candidate on the ballot as an

independent or as the candidate of a different political party.[6] But, as the district court found, that is not a realistic option in Supreme Court races: in virtually every case, the winner of the dominant party's convention is the automatic winner of the general election. Thus, the New York electoral system, by denying rank-and-file members *any* effective access to the candidate-selection process, imposes a severe burden on the associational and voting rights of the members. Under those circumstances, the burden of proof falls on the Board to demonstrate that the electoral system serves a compelling government interest in a narrowly tailored manner. *Burdick*, 504 U.S. at 434.

WLF does not mean to suggest that *nonmembers* of the dominant political party have any basis for complaining that they have been excluded from the party's candidate selection process. The Court in *Jones* rejected a contention that a nonmember should be deemed "disenfranchised" simply because the nonmember's "keen desire to participate in selection of the party's nominee" is not fulfilled. *Jones*, 530 U.S. at 583 (explaining that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership") (internal citation omitted). But members *do* have a valid constitutional claim. They may not be excluded from the nomination process of their own political party if the result is to deny them *any* ability to associate for the advancement of political beliefs regarding the election and *any* ability to cast an effective vote.

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[6] *But cf. Bullock*, 205 U.S. at 146-47 ("[W]e can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the [primary election] filing fees imposed by state law.").

C. Petitioners Have Failed to Meet Their Burden of Proving That the Severe Burdens Imposed on Respondents' Associational Rights and Voting Rights Serve a Compelling Interest in a Narrowly Tailored Manner

None of the interests asserted by the Board in support of its voting restrictions are sufficiently compelling, or sufficiently narrowly tailored, to justify the burdens imposed on Respondents by the New York electoral scheme. In particular, New York's interest in preventing excessive partisanship in judicial elections – as a means of promoting judicial independence – can be satisfied without imposing the severe burdens on associational rights and voting rights imposed under the current electoral scheme.

WLF notes initially that the district court's findings on this issue are entitled to substantial deference. The Court reviews a district court's "ultimate conclusion" on preliminary injunctions for abuse of discretion. *McCreary County, Ky. v. ACLU,* 545 U.S. 844, 867 (2005); *see also Ashcroft v. ACLU,* 542 U.S. 656, 664 (2004) (Supreme Court "has always applied the abuse of discretion standard on review of a preliminary injunction"). In *Ashcroft*, the Court also held that when the constitutional question is close, the Court "should uphold the injunction and remand for trial on the merits." *Id.* 664-65. To the extent that issues regarding whether a State interest is compelling and whether the implementation is narrowly tailored are deemed issues of fact, even greater deference is warranted. Fed.R.Civ.P. 52(a) provides that findings of fact should not be set aside by a reviewing court unless "clearly erroneous." *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (Supreme Court reviews district court factual findings for "clear error"). When (as here) a federal appeals court has reviewed and affirmed a district court's factual findings, the

Court will "'not lightly overturn'" the district court's findings. *Id.* (quoting *Neil v. Biggers*, 409 U.S. 188, 193n.3 (1972).

The trial court's rejection of New York's avoiding-excessive-partisanship argument was eminently reasonable and certainly did not amount to an abuse of discretion. Pet. App. 177-81. The trial court correctly viewed this type of argument (e.g., if open primaries are held, judicial candidates may have to "pander to individuals or corporations who will support their candidacy") as "justifications for eliminating elections as a method for selecting judicial officers" rather than as justification for severely burdening associational rights and voting rights. *Id.* 178. More importantly, the argument rings hollow when one considers that nominees for all New York judgeships other than Supreme Court Justices are selected by open primaries. If New York really believed that its convention system served a compelling interest in reducing excessive partisanship in judicial elections, one would expect that New York would have abandoned open primaries for some or all of its other judgeships as well.

Moreover, *White* discussed a wide range of alternative judicial election systems that, on the one hand, are designed to avoid excessive partisanship in judicial elections but, on the other hand, avoid placing effective control over selection of judges into the hands of political party leaders. *See, e.g., White*, 536 U.S. at 791 (15 States have adopted the Missouri Plan, under which judges are appointed by high elected official, then subsequently stand for unopposed retention elections in which all voters are permitted to decide whether judge should be recalled); *id.* 792 (at least 16 States use nonpartisan judicial elections). If New York really believes it has a compelling interest in avoiding excessive partisanship in judicial elections, it could significantly reduce the existing

severe burden on associational and voting rights by adopting one of the alternatives discussed in *White*.

II. THE DECISION BELOW POSES NO THREAT TO THE ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES

WLF has long advocated in support of the First Amendment rights of political parties and believes that they should be granted considerable leeway in the manner they go about choosing their standard bearers for general elections. Nonetheless, WLF does not share the concern of many of the Petitioners that the decisions below will undercut the associational rights of political parties.

In particular, the district court injunction poses no threat to the associational rights of New York's political parties. Indeed, the injunction names State officials only; political parties are not required to do anything. If the injunction is allowed to take effect, New York at least temporarily will have primary elections for Supreme Court Justices – identical to the primary elections currently used to select party nominees for other judgeships in New York and party nominees for judgeships in numerous other States. So long as the elections are limited to those willing to associate themselves with the party in whose primary they are participating, such primary elections do not constitute a burden on the political parties' associational rights. This Court has repeatedly made clear that States may *require* parties to select their nominees through primaries in which all party members are entitled to participate. *See, e.g., Clingman v. Beaver*, 544 U.S. 581, 599 (2005) (O'Connor, J., concurring in part and concurring in the judgment) ("Nearly every State in the Nation now mandates that political parties select their candidates for national or statewide office by means of primary elections."); *American*

Party of Texas v. White, 415 U.S. 767, 781 (1974) (it is "too plain for argument" that States may require political parties to select their candidates through primary elections). Thus, a decision by New York to begin using primaries to select nominees for Supreme Court Justices will not burden any recognized associational right of political parties.

WLF would agree, *as a policy matter*, that political parties generally should be granted broad leeway in selecting a method for choosing candidates; but they have no constitutional right to select their candidates through a convention system. Nor can the district court fairly be said to have prohibited all convention systems; rather, it merely prohibited one convention system that imposed particularly severe burdens on constitutional rights.

As noted above, the current election system would not be objectionable but for a unique feature of that system: New York lacks judicial districts in which there are two credible political parties, and thus general elections for Supreme Court Justices are merely a "formality." Pet. App. 129. Accordingly, it is not fair to criticize the decisions below for undermining convention systems. The precise "delegate primary"/convention system employed by New York would not, in WLF's view, be constitutionally problematic if adopted in a State with competitive general elections for judges. Moreover, if several of the more severe burdens imposed by the New York system were removed (*e.g.*, the excessive number of signatures that delegates are required to gather, the extremely tight time frame for collection of signatures, and the strict limitation on the number of delegates), it might well be that the revised system could pass constitutional muster.

Nor is there any indication in Supreme Court case law that the Constitution prohibits a political party from selecting

its nominees at a political convention. For example, the Court reviewed Virginia's use of conventions to select party nominees in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996). Although the Court faulted the Republican Party of Virginia for changing its convention rules (it began charging a filing fee for delegates) without obtaining preclearance from the U.S. Department of Justice as required by Section 5 the Voting Rights Act of 1965, the Court gave no indication that it viewed the convention system as constitutionally problematic. Similarly, the Court gave no hint that the convention system employed in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), raised any constitutional concerns. *Tashjian* addressed whether political parties had a constitutional right to require a State to allow the parties to invite independents to vote in their primaries, but access to the primary ballot in that case was significantly burdened by a statute that limited ballot access to candidates who received at least 20% of the delegate vote at the state party convention. *Id.* 220. The Court gave no indication that this ballot-access limitation was constitutionally suspect.

In sum, nothing in the decisions below calls into question the constitutionality of using conventions to select party nominees, and (should State officials so desire) it might even be possible for New York to redraft its Supreme Court Justice nominee selection rules in a manner that retains conventions yet conforms to the decisions below.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court affirm the decision of the court of appeals.

Respectfully submitted,

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Dated: July 13, 2007

IN THE SUPREME COURT OF THE UNITED STATES

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NEW YORK STATE BOARD OF :

ELECTIONS, ET AL., :

Petitioners :

v. : No. 06-766

MARGARITA LOPEZ TORRES, :

ET AL. :

- x

Washington, D.C.

Wednesday, October 3, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10: 02 a.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of Petitioners New York State Board of Elections, et al.

ANDREW J. ROSSMAN, ESQ., New York, N.Y.; on behalf of Petitioners New York County Democratic Committee, et al.

FREDERICK A.O. SCHWARZ, JR., ESQ., New York, N.Y.; on behalf of Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
THEODORE B. OLSON, ESQ.	
On behalf of Petitioners New York State Board of Elections, et al.	3
ANDREW J. ROSSMAN, ESQ.	
On behalf of Petitioners New York County Democratic Committee, et al.	17
FREDERICK A.O. SCHWARZ, JR., ESQ.	
On behalf of Respondents	25
REBUTTAL ARGUMENT OF	
THEODORE B. OLSON, ESQ.	
On behalf of Petitioners New York State Board of Elections, et al.	52

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Case 06-766, New York State Board of Elections v. Torres.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON.

ON BEHALF OF PETITIONERS NEW YORK STATE BOARD OF ELECTIONS, ET AL.

MR. OLSON: Mr. Chief Justice, and may it please the Court:

For 10 years, New York relied on political party primaries to nominate general election candidates for supreme court justice, but that process discouraged qualified candidates and spawned unseemly, expensive, and potentially corrupting fundraising by judicial candidates.

So the legislature substituted an indirect party primary system at which delegates are elected who, in turn, select general election candidates at political party conventions.

The Second Circuit concluded that the delegate convention statutes enabled political parties to exercise too much influence at the expense of the insurgent party members or insurgent candidates and

struck those statutes down as facially unconstitutional and reinstated the discredited primary process.

The issue in this case is whether the delegate-convention system is facially unconstitutional because it allows party leaders to defeat the aspirations of party insurgents.

States have broad, as this case has repeatedly held -- broad constitutional latitude to prescribe the time, place, and manner of elections, particularly elections for State office.

JUSTICE KENNEDY: Just focus on, if you would, Mr. Olson, on the election for the delegates.

Now, suppose it were shown -- a hypothetical case -- that it's extremely difficult to get on that ballot. You need, let's say, 2,000 signatures in 30 days. Would there be a constitutional issue raised by that situation?

MR. OLSON: Well, in the first place, as you know, Justice Kennedy, that -- that is not the case here. It takes 500 signatures --

JUSTICE KENNEDY: A hypothetical case.

MR. OLSON: If it were an impossible burden to get on the ballot, I still don't think that First Amendment associational rights would be involved.

JUSTICE KENNEDY: What about Kusper, the

Kusper case?

MR. OLSON: I don't think the Kusper case goes that far, Justice Kennedy. I think that, as the cases of this Court --

JUSTICE KENNEDY: I think we have made it very clear that if you're going to use a primary system, you can't have such burdensome registration requirements that the primary system is not, to all intents and purposes, to all intents and purposes open to those who wish to participate.

MR. OLSON: I think that the other factor that is involved here is that, provided that there is reasonable access to the general election, which is another factor in this case, then the constitutional rights to associate are satisfied.

JUSTICE KENNEDY: So you think that in Kusper, if -- if there was reasonable access to a general election, you can structure and stifle the primary any way --

MR. OLSON: Well, I think that --

JUSTICE KENNEDY: I'm just looking at the principle here, and it may be that you'll say that there's no burden here, et cetera. But I just want to know: Isn't there a constitutional principle that we are entitled and we must look at the fairness of the

primary system insofar as participation of the voters?

MR. OLSON: I think that the case that maybe best answers that is the Munro case, in which the State of Washington's practice -- and there was a different practice of the State of Washington before this Court earlier this week. But at that point in time the process was that there was an open blanket primary, which was not held unconstitutional at that point, where the major candidates -- the one and two positions of the major candidates of each of the political parties would get on the ballot, and then the Socialist Party was complaining because it took 1 percent of the votes of the primary process to get on the general election ballot.

This Court held that that -- that that was not an impossible burden, and that -- the principle from that case and the other cases, the American political -- American Party of Texas v. White and so forth, the Court's jurisprudence has held that, as long as there is reasonable access for a candidate or a political party to the general election process, then it does not have to be provided in that level in the primary.

CHIEF JUSTICE ROBERTS: Is it right to regard the election of delegates here as a primary election?

My understanding, of course, is that that simply elects -- it doesn't get you on the ballot. It elects delegates who then exercise the choice. Do you think our primary election cases are transferable to this situation?

MR. OLSON: Well, I think there are two answers to that. Your primary election cases talk in terms of, the ones that have been mentioned in the briefs here, talk particularly in terms of protection under the Equal Protection Clause.

This is -- it's called a primary, but it's an election of delegates by party members that -- and then, when those delegates get together, they go to the convention. So I'm not sure that the nomenclature makes so much difference as this is a process that the State has allowed the party to implement to choose its leadership. The Court has repeatedly held that there is no point in the process --

JUSTICE SCALIA: The State has not allowed it. The State has required it, no?

MR. OLSON: Yes, the State requires it, but it --

JUSTICE SCALIA: Although if we -- if we hold it unconstitutional for the State to require it, I suppose it would also be unconstitutional for the State

merely to allow it, wouldn't it? So that this manner of selecting judges in any other State, if it has been voluntarily adopted by the party, would be unconstitutional?

MR. OLSON: That's the principle that the Respondents in the Second Circuit advance. It would strike down the conventions, because conventions are, by definition, selections of individuals to represent the broader constituency at a subsequent --

JUSTICE KENNEDY: Just to make it clear, is it your position that, with reference to this election for delegates, the State can make it as burdensome as it chooses on those who wish to put themselves forward on the ballot as a proposed delegate?

MR. OLSON: I think, Justice Kennedy, as long as the system in the State provides a reasonable access to candidates and political parties to the election process, that there is not a First Amendment right with respect to the primary process or the preliminary process, which in this case includes both the so-called delegate selection primary --

JUSTICE SCALIA: What if -- what if it were the parties that objected to this and not some individual who said, I'm not being given enough voice in the party? What if the parties said, we don't want to

select our candidates this way? Is it clear that the State could impose it upon them?

MR. OLSON: It's clear the State has the right, and this Court has said so in the American Party of Texas v. White, that the State can require either a primary election or a convention. The Court specifically addressed that. In fact, what the Court said: It is too plain for argument that a State may insist that intraparty competition be settled by primary or convention. That's the holding of that Court --

JUSTICE GINSBURG: That convention -- conventions can come in all sizes and shapes. The argument here is that this system shuts out rank-and-file party members and gives the total control to the party leaders, and that the preliminary was the primary or selection of delegates, but it's really a sham because nobody is going to run for that except the party faithful, someone picked by the party boss.

So the argument on the other side is that this system, as complicated as it is, reduces to the party leaders choose the candidates.

MR. OLSON: Well, what this Court has said in the California Republican Party v. Jones case, a cite quoting the Eu case, the Eu case that the Court had decided before, is that the political party has the

right to select its leadership, to select its nominating process, to select its candidates, and to exclude members. So, Justice Ginsburg, the party has the right, even arbitrarily, as long as the Fourteenth Amendment is not violated in an election context, to exclude members of its party.

JUSTICE SCALIA: Well, the State can restrict that right if it wants to. The State can require the party to select its candidates by -- by primary.

MR. OLSON: By primary or -- or by convention.

JUSTICE SCALIA: Or by convention.

MR. OLSON: Right.

JUSTICE SCALIA: But if the State wants to do it by smoke -- if the party wants to do it by smoke-filled room, the State can say, if it wishes to say, you can't do it by smoke-filled room.

MR. OLSON: It can, Justice Scalia, but the State must respect the rights of the political parties in determining who their leaders and candidates must be.

JUSTICE SCALIA: Well, but that -- but that's not the issue here. The State and the party are in agreement.

MR. OLSON: Yes. Yes.

JUSTICE SCALIA: The State is not trying to coerce the party into doing something that it doesn't want to do.

MR. OLSON: Yes, I totally agree with you. But I'm answering hypothetical questions with respect to something else. What this Court has said, that this Court vigorously protects the special place the First Amendment reserves for the protection by which a party, political party, selects a standard-bearer. Selecting a candidate is selecting the person that will communicate the party's interests --

JUSTICE GINSBURG: So the party is -- you're identifying the party with the party leader because the argument comes down to this is not the rank and file that's making this election; this is the party leader; and the party might like that or the leadership might like that, but the rank and file might not, and the argument is that they have rights of association, too.

MR. OLSON: Well, they have rights of association, but they have -- they have associated in a political party which has elected leadership which makes decisions, Justice Ginsburg.

They do not have a right to belong to the Democratic Party or the Republican Party. The rank and file, so forth -- the definition of "insurgent," which

is at the other side of the table here, are people that are rebelling against the duly elected leadership of the political party.

JUSTICE KENNEDY: But if there is a State-mandated primary, I thought it's basic law that the State may not place unduly restrictive barriers to participation in that primary. I think that's a given, it seems to me. Now, tell me if I'm wrong --

MR. OLSON: I may be --

JUSTICE KENNEDY: And then we can argue about whether the burden is too great here, which it may not be.

MR. OLSON: Let me say, Justice Kennedy, that I may be wrong in terms of what this Court's decisions stand for with respect to ultimately allowing, as far as associational rights are concerned, individuals and parties access to the total electorate. But even if your premise is correct that there must be an open access in a reasonable way to either the -- to both the primary and the general election, then this process is reasonable. It's not unreasonably difficult for a person to participate.

Let me say -- let me enumerate the ways. An individual, a rank-and-file member, can campaign and vote for delegates. An individual might become a

delegate himself by -- or herself, by getting 500 names on a signature, and that's far below what this Court has indicated before was -- was an acceptable level of requirement of access to the ballot. An individual can attempt to form delegate slates, can attempt to persuade the delegates, can -- the individual can form or switch parties.

In this case the Respondent Lopez Torres, actually in the 2003 election, became a candidate at the general election for supreme court justice of the Working Families Party, and she did that without giving up her registration and membership in the Democratic Party. She was in that election and she lost. Finally, and this is even if she hadn't been able to secure the nomination of that political party, she could run in the general election. There's access to -- it takes 3500 to 4,000 signatures to run as an independent body in the general election.

So there is way after way after way for individuals in New York to participate in the election process.

So in answer to your question, Justice Kennedy, to the extent that your statement of the principle with respect to access to both the primary and the general election is -- is the law of this Court,

then that access exists here.

But I come back to the point that political parties have the greatest possible latitude -- yes, Justice Scalia, that the Court has upheld certain restrictions with respect to how the nominee of the party gets selected. But the Court has also said that when the party is in that process, its powers and rights and First Amendment freedoms to elect the standard-bearer, to select the standard-bearer, are at their apogee, because the person selected as a candidate, whether that person might be the most favorable person to the rank and file, the duly elected leadership of the political party might decide, well, that person really isn't qualified to be a supreme court justice even --

JUSTICE SCALIA: Have we -- have we imposed any such restrictions on our own, as opposed to merely upholding restrictions that were imposed by the State? That is to say, have we held that the Constitution itself imposes certain restrictions?

MR. OLSON: Except in the context of analyzing what State requirements have been?

JUSTICE SCALIA: Yes. I want a case where the State did not impose the restriction and it was up to us to decide whether the State could do that or not,

but rather the State said the party can do whatever it wants, and we have disallowed what the party itself chose under no compulsion from the State --

MR. OLSON: Aside --

JUSTICE SCALIA: -- on the basis of some constitutional principle apart from the Equal Protection Clause --

MR. OLSON: Yes. The only cases --

JUSTICE SCALIA: -- or the Thirteenth amendment.

MR. OLSON: The only cases that I would submit, that I'm aware of, that would answer that would be Equal Protection Clause cases, because the -- these -- the political party is a group of people that decide to form together because of common beliefs. In the -- that is the maximum freedom that we allow for associations.

With all the business about smoke-filled rooms and things like that, people have the right to decide, make decisions --

JUSTICE KENNEDY: Do you think a political party could say, you can't vote in our primary unless you've been a member of our party for 4 years?

MR. OLSON: Yes, Justice Kennedy. I -- I don't -- in an association --

JUSTICE KENNEDY: This would be a State-mandated party primary for --

MR. OLSON: Well, a party might --

JUSTICE KENNEDY: -- election --

MR. OLSON: A party would -- there's two questions there. If the party wants to have a 4-year requirement before you can be a part of that association, I can't understand what the First Amendment associational right would be.

JUSTICE STEVENS: Well, what about --

MR. OLSON: If the State imposed that, the party could say, well, that's unreasonable; we want to open -- in fact, the Court decided this by saying that the --- the party who wanted to could allow independents to vote.

If I might, Mr. Chief Justice, may I reserve --

JUSTICE STEVENS: Didn't Justice Kennedy asked if the Kusper case was correctly decided?

MR. OLSON: Well, I'm not -- I think I tried to answer that the best I could by saying that I think the import of the cases, without getting into the specifics of that, are that if you have a reasonable access by individuals or political parties to the electoral process, that satisfies the Constitution.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.

Mr. Rossman.

ORAL ARGUMENT OF ANDREW J. ROSSMAN

ON BEHALF OF PETITIONERS NEW YORK COUNTY DEMOCRATIC COMMITTEE ET AL.

MR. ROSSMAN: Mr. Chief Justice, and may it please the Court:

I'd like to begin by responding to Justice Kennedy's question regarding the election of delegates and fairness for voters. There are two responses: In this case that I have -- this case, there was conceded below that the requirement for delegates of getting only 500 signatures was no barrier at all.

And secondly, I would say that in considering that question, Justice Kennedy, the important thing is to consider what is the intended role that the State gives to the participants in this process? And what the role here is that individual voters have the opportunity to vote for local delegates who are to represent their interests at the convention. As Cousins instructs, once they have the opportunity to pull a lever for the delegate that shares their values and their preferences, their right of suffrage is satisfied.

What they do not have, what Respondents and what the lower courts would like to have exist but doesn't exist and isn't required under the Constitution, is the opportunity for rank-and-file voters to vote directly for the candidates at the nomination stage, and that's the difference between a delegate-based convention and a primary.

If we agree, and I think the Court would agree, that there is no right to a primary -- that's something, in fact, that's conceded in this case; there is no constitutional right to a primary -- then there is no State requirement that there be a direct opportunity for association between voter and candidate at the nomination phase; that it is perfectly appropriate and constitutional for that association to be between voter and delegate, and the voters then rely on their locally-elected delegates to advance their interest in the convention process.

That's the difference between a convention and a primary. We think it's a critical one here. So the cases --

JUSTICE GINSBURG: In practice, how many people other than the slate selected by the party leaders run in New York for this delegate position?

MR. ROSSMAN: In New York City, the evidence

below was that approximately 12 to 13 percent of delegate slates are contested. What we suggest is that the availability of a contest is the key. It's not the frequency of the contest, because there's also evidence in the record that for open primaries for civil court, which is the closest parallel, that those are only contested 28 percent of the time.

So the fact that an election is not contested, that there may be voter apathy out there, that there may be party unity that causes people to rally behind the parties and their leadership, is not a constitutional problem.

JUSTICE BREYER: The theory of this, I take it, is that, just as you said, voters elect convention delegates, and those convention delegates choose the official nominee, say, of the Democratic Party. So that nominee goes on to the final ballot.

MR. ROSSMAN: Correct.

JUSTICE BREYER: Well, what then of the fact that the convention delegates when they meet won't let people who would like the position of the judge appear before them?

MR. ROSSMAN: Well, that is not the general case in the State of New York.

JUSTICE BREYER: It's not?

MR. ROSSMAN: But even if it is, the important thing is not that individual candidates appear to politic before the delegates, it's that delegates have the freedom under the statute to vote for whatever candidate they like. There's evidence that there's legislative intent that, in fact, candidates not appear at the convention because it would be unseemly for them to do so.

JUSTICE BREYER: Well then, how are the delegates to find out the qualifications? In other words, if that's the intent of this statute, then you have a statute that's designed on the one hand to have convention delegates who will choose, and on the other hand to prevent the convention delegates from finding out the qualifications of the different applicants, in which case it would seem to be a statute that would give the actual power of selection to the leader or the chairman -- I forget the title -- of the Democratic Party. And I don't know about the constitutionality of that or not. In other words, go ahead.

MR. ROSSMAN: Let me respond to the most difficult part of your question first, which is the constitutionality of the party leader selecting a candidate we think is not troublesome at all. In fact, there are many instances in New York and in other States

where the political leaders, through their structure, do pick the candidates, for example in the case of vacancy election, which this Court upheld as constitutional in the Rodriquez case.

But the question that I think that you're asking is, is there some denial of voter or delegate education, and does that pose a constitutional problem? We have here a bare statutory framework and the statutory framework does not in any way, shape, or form preclude the ability of delegates to become educated about the candidates. Within that bare statutory framework. The parties themselves, through what we contend is core associational activity protected by the First Amendment, participate in their own way of choosing in educating delegates and in putting forth the candidacies of judicial -- potential judicial nominees.

CHIEF JUSTICE ROBERTS: I suppose that the State can make the judgment that it's more likely that the delegates would be informed about the qualifications of candidates for judgeship than voters?

MR. ROSSMAN: In fact, we think that is the very judgment that the State has made here. And when, as Mr. Olson said, when it went from a primary to a convention process, the idea behind it in part was that the delegates could be more educated, would be expected

to be more educated than rank-and-file voters would be about judges. And the evidence in this case is that rank-and-file voters are not educated hardly at all about the judge candidates that they select. So we think this is clearly a legislative sensible policy choice to put the selection process in the hands of those who have the motivation and the opportunity to become more educated about those that they're selecting.

Now, one thing that needs to be recalled in this process is, of course, it is not merely a State-run election. As -- as the Court observed in Jones, it is a party affair, too. So there are core First Amendment rights of the parties themselves that attach.

And the question -- I think in response to Justice Ginsburg's question about whether there's confusion between the party leaders and the parties, it is our reading of the Eu, Tashjian and Jones cases that the Court has recognized that parties have a structure and have the core constitutional right to create their own structure, and their leadership can make choices for the parties. So they can choose to endorse candidates, for example. They can choose to associate or not associate with particular individuals. And that's a choice that's made here by duly elected leaders of the parties.

And if there's a problem with that, the remedy for that problem is in the political arena. The remedy is for the rank-and-file voters to vote their party leaders out when they come up for election if they adopt a process that they don't like or they think squelches the input of the rank-and-file members.

So the reason that -- the reason why that's not happening here, we believe, could be attributable to one of two things. It could be attributable to apathy, which the Constitution does not have a prerogative to stamp out, or it could be attributable to party unity and the fact that leaders are sensitive to who will be best to advance the interests of their rank-and-file members. But we don't think there's a constitutional problem with that.

JUSTICE GINSBURG: But if the autonomy of the party and, let's say, the leader is the justification for this, the party -- how -- how autonomous can a party be when it's told, even if you want to be more democratic about how you choose your candidates, you can't because New York is forcing this system on you?

MR. ROSSMAN: Well, the only system that New York is forcing is a bare framework for representative democracy. It's a convention. It's no different than

--

JUSTICE SCALIA: Well, the parties are not protesting in this case, are they?

MR. ROSSMAN: Absolutely not.

JUSTICE SCALIA: If and when that situation arises, I suppose we can -- we can decide it. But it's not here. The parties are totally happy with this and would do it on their own.

MR. ROSSMAN: We absolutely agree. The parties intervened from the outset of this case, both major parties, because they share the view that the system is better than a primary would be, and they believe that their right --

JUSTICE SCALIA: In fact, it is probably likely the parties got this system adopted by the New York legislature.

MR. ROSSMAN: Well, however the legislative process has unfolded, in 1921, multiple times since, and to the present when the legislature filed an amicus brief with the Second Circuit, the legislature has clearly been in support of this. And we think it's within -- it's a core State power, it's a sensible legislative choice that they have made. It' ss within the contours of American Party of Texas v. White, which recognized, as Justice Scalia observed moments ago, that

the State can choose to have primaries or conventions.

Where the State has chosen to have conventions, party rights attach to that. And the one thing that the lower court did that we urge the Court to consider to be quite inappropriate was to apply strict scrutiny to what is routine core party associational activity. Leaders developing candidacies, recommending candidates, endorsing candidates, and fielding delegates who they think are loyal to the interests of the party, that doesn't deserve strict scrutiny. At worst, we think there's no burden here to the rank-and-file voters to force them to participate in the party's own convention. But even if there were some burden, at worst, we think that there are countervailing rights here. And where there are countervailing rights the Court should prefer to the legislative expertise here, and the expertise -- thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Rossman.

Mr. Schwarz.

ORAL ARGUMENT OF FREDERICK A.O. SCHWARZ, JR.

ON BEHALF OF RESPONDENTS

MR. SCHWARZ: Mr. Chief Justice, and may it please the Court:

On a robust record, the district court,

confirmed in great detail by the Second Circuit, found that there were severe burdens placed upon insurgents and placed upon party members who wished to band together to support a candidate.

JUSTICE KENNEDY: What about the burden on a single delegate wanting to be on the ballot? I think that requires 500 votes, and there was no specific finding that that was burden, was there? Or am incorrect?

MR. SCHWARZ: Two --there was no specific finding that was a burden, you're correct. I have two additional points to make.

First, if you look at John Dunne's amicus brief, John Dunne was a Republican leader in the State of New York. He was chairman of the judiciary committee for many years in the State Senate. And he on page 19 of his brief describes how it was impossible even for him, to get admitted as a delegate, and it wasn't worthwhile to try and be a lone gadfly.

Secondly, the courts analyzed the burden in terms of the difficulty of assembling and running a slate of delegates, a slate that cut across the various assembly districts, and the court found --

JUSTICE ALITO: Assuming that the plaintiffs have associational rights at stake here, isn't this a

case where there's a conflict between two associational -- two sets of rights of association? You have the party hierarchy who wants to, in your own words, fence out the insurgents. That's a right not to associate. And then you have the insurgents who want to be fenced in?

MR. SCHWARZ: Well, the --

JUSTICE ALITO: Isn't that different from the cases that you rely on?

MR. SCHWARZ: I -- I think not, Your Honor, because I think if you think about the question of do the party leaders have the right to stifle the voices of ordinary members, one should conclude no, and it's very different from your decision in Jones.

JUSTICE ALITO: But that's charged language: They have the right to stifle.

MR. SCHWARZ: Okay.

JUSTICE ALITO: The insurgents, do they not -- does not the right of association include the right not to associate?

MR. SCHWARZ: I think, Your Honor, the right of association does not include the right to use an election system imposed by the State which makes it impossible. That's where the burden comes from. It's because the State has imposed this system on every

party. So I do not think there is a countervailing right on the other side.

JUSTICE KENNEDY: What are your -- what are you best cases for that proposition?

MR. SCHWARZ: In the -- I would say in the first place I'd have to start out by saying there's not the case on all fours like this. The -- then I would say that's quite clear why that would be, because there's no system like this in the United States and never has been.

The -- I guess I would say after that point, that the cases -- first, there are principles in your cases. There's a principle being worried about the effect of State laws serving to entrench power. That's a theme that runs through all your cases.

Secondly, there is in your cases the -- many, many cases that hold what's important is to make a realistic assessment of how a statute actually works.

Now, having said those two points by way of -- three points by way of preliminary, first, there's nothing on all fours and really you wouldn't expect it, then what are cases that I think are -- that bite in our favor? Well, there are principles in the cases.

I would start with Storer and Storer says in assessing severe burden what you want to look at is the

-- is the realistic effect of whether people have gotten on the ballot. And Storer says if you find that happens rarely, while it's not conclusive, it's the -- it's indicative that there is a severe burden.

JUSTICE GINSBURG: But Storer --

CHIEF JUSTICE ROBERTS: Isn't that a general election case?

JUSTICE SCALIA: That's a general election case, isn't it?

MR. SCHWARZ: Well, but the principles of whether the election, general election cases and the primary cases should apply, it seems to me are the same principles. The root principles that apply are the same ones.

CHIEF JUSTICE ROBERTS: Well, let me ask you about that.

MR. SCHWARZ: Please.

CHIEF JUSTICE ROBERTS: Let's suppose the State doesn't think that direct voter election of judges is a good idea, that it thinks there ought to be some insulation to avoid the problems of judges campaigning and raising money and all that; yet, at the same time they want some participation by the voters in the process. Is there any way they can achieve that objective, to have the nominees actually chosen not by

the voters but by a convention, and yet have some role by the voters?

MR. SCHWARZ: There absolutely is, Your Honor. We do not claim here that any convention is inappropriate. Conventions are appropriate.

CHIEF JUSTICE ROBERTS: No, I'm just asking is there a way to have a convention with some role by the voters or the party --

MR. SCHWARZ: Yes, Your Honor, as long as that convention does not set up severe barriers to people competing; and I would say even if you look at the Board of Elections' own --

CHIEF JUSTICE ROBERTS: Well, doesn't that seem kind of odd, that if a State can have no role for voters, it can have a pure convention, that they're penalized if they have some role for voters?

MR. SCHWARZ: I wouldn't put it as being penalized, Your Honor. I think it is the --

CHIEF JUSTICE ROBERTS: Being found unconstitutional is a pretty severe penalty.

(Laughter.)

MR. SCHWARZ: But it's what we seek and we think the courts below appropriately granted, Your Honor. The -- but it's not penalizing the State for doing something; it's saying if do you this, and if you

severely burden, as after an extensive fact-finding hearing the court held the statutes do, then you have to show that there's a compelling justification.

JUSTICE SCALIA: Mr. Schwarz -- I'm sorry, go ahead.

JUSTICE SOUTER: The, the problem that I have in the analogy you are drawing on the application of your principle based on the general election cases is this: There is concededly -- and you mentioned this earlier -- there is concededly no unreasonable barrier to somebody who wants to become a delegate. He's got to get 500 signature, but that can be done. The burden that I understand that your clients are complaining about is the, in effect, the burden of influencing the ultimate decision-maker to decide to nominate that person.

And that burden is -- is focused on two points: number one, the entrenched power of the political bosses; and number two, the difficulty -- well, I guess three points -- the difficulty of fielding, for a dissident to field a whole slate of candidates who in effect, once elected, would make the nomination desired; or, three, the capacity of the intending or the aspiring candidate to influence the delegates directly once they're selected, because the

time is short.

And those aren't -- those aren't, it seems to me, complaints about access to the electoral process. They're complaints about the capacity to influence those who are elected, who make the ultimate decision. And that's the difficulty I have in the analogy that you are drawing or the parallel that you are making between the direct election cases and your claim here. Could you comment on that?

MR. SCHWARZ: Yeah. I guess I want to make two comments. First, it seems to me the principles that are in your direct election cases, and also primary cases like Kusper and the Panish v. Lubin or Lubin v. Panish, where the Court took the language in your Williams case about you ought to be worried if there are multiple parties competing, clamoring for a place on the ballot, and said, well, that should also apply -- this Court said that should also apply in a primary context where there are multiple people seeking to -- to attain a nomination.

Now, should it matter because here the primary or the election -- it's really an election but the State happens to call it a primary -- should it matter that that is in the preliminary stage, in the nomination stage?

I would suggest it should not.

Now, I think your --

JUSTICE SOUTER: But it's still the case that at the end of the day, the nub of your claim is that the intending judicial candidate cannot effectively politic, does not have a reasonable chance of getting selected; and I don't see that as a -- as a direct ballot access claim.

Let me put the question in another way: Your -- your friend on the other side, Mr. Rossman, in response to a question, said that if this election of the judicial candidate for the party were made directly by the political bosses, whatever their titles are, the ones who are supposedly in control here, he would not see any constitutional objection to that.

What if New York had a system that provided precisely for that? The political bosses, as I understand it, get elected every 2 years and the State law would provide that those party bosses, whatever their title is, would in fact select the candidate. Would that be unconstitutional?

MR. SCHWARZ: I think I would like to draw a distinction between the law as I think you've described it and a different law that Justice Scalia described. I think the law that Justice Scalia described would be

constitutional. If what the State did is to say, you the party decide on what to do, I think the State is then not putting a thumb on the scale; the State is not interfering with the disputes within the party.

However, on the statute that I think you described, Justice Souter, where the State says, we decree that for every party the leader shall make the decision, I think that would be unconstitutional because the State has no business intervening in the --

JUSTICE SOUTER: But the party isn't objecting.

MR. SCHWARZ: Well, Your Honor, I think that's --

JUSTICE SOUTER: The party -- the party likes it.

MR. SCHWARZ: I'm sure the party likes it.

JUSTICE SOUTER: And you are the -- the claim here: These people are not, as I understand it, bringing a case on behalf of rights of the party. They're bringing a case based on a premise of a principle of participation, which is theirs.

And that's why, it seems to me, that the hypo that I posed is not significantly different, provided the parties aren't objecting, in which we have a different case.

But it seems to me that my hypo is not significantly different from the one that gave rise to the question that Mr. Rossman answered.

MR. SCHWARZ: Well, the -- first, on the consent of the party leaders, which is really what we have here, of course they are -- they like the system because the State system entrenches them.

And -- and this Court --

JUSTICE SOUTER: Well, the Federal system in practice entrenches United States Senators.

I'm -- I'm not sure that, in terms of political participation on the part of an intending or an aspiring judge that the system that I suggested in the hypo, in which the party bosses select the nominee, is for constitutional purposes significantly different from the Federal system for -- for picking district judges.

MR. SCHWARZ: Well, because the Federal system provides that there shall not be elections. Here elections --

JUSTICE SOUTER: Sure. And in my hypo the only election is the election for the party boss.

MR. SCHWARZ: Well, I would still suggest, Your Honor, that, as we see the case that would be unconstitutional. But our case is much stronger than

that because, in any event, there is here an election for delegates.

JUSTICE SOUTER: Okay. But isn't your argument still that, because there is a limitation on the participation of the intending judicial candidate, there is ultimately a constitutional problem?

So let me pose a different question to you, and this one is not hypothetical. The nub of your case is that the political bosses in effect are controlling the process because they tell the delegates who to vote for. Does your -- does the intending judicial nominee whom you represent have any difficulty in getting to the political bosses and saying: I want you to consider me?

MR. SCHWARZ: Yes. They would not listen to her, and they said: We won't listen to you in this particular case; we won't listen to you because you declined to hire an unqualified person as your law clerk.

JUSTICE SOUTER: Sure. They -- for political reasons, they're saying: We don't like you. There are -- there are a lot of people who go to United States Senators, and the United States Senators say: Scram; we don't -- we don't like you; your politics aren't good enough for us.

And so I'm not saying that -- that -- on my

hypo the person who lobbies the bosses directly is --is claiming a right to success. I think they're claiming a right to have a chance to influence the process. And why don't they have the chance by going to the boss?

MR. SCHWARZ: Well, Your Honor, let me try two things. First, that never has worked. And it -- it has to be -- at least using the Storer analysis of what actually happens, the fact that never in the history of New York, not in the Republican Party, not in the Democratic Party, not in New York City, not in upstate, never has someone who was opposed by the party boss been able to become a judge.

JUSTICE SOUTER: And I don't know of any enemy of a United States -- go ahead.

JUSTICE SCALIA: The person wouldn't be opposed if he approached the boss and the boss said: Yeah. Boy, I really like you. That person would automatically not be a rebel. He'd be part of the establishment.

(Laughter.)

MR. SCHWARZ: But the -- you know, this isn't an issue that divides by ideology. It's -- really, the question here is if you have a statute that makes it difficult for the voters to participate, to have a voice. That's really the question. And if I

could use something that the Board of Elections' brief conceded in both their reply and their opening brief, they said a person -- they said that party members who wanted to attempt to assemble a slate to try to influence the decision at the convention would be "well served" -- that's their exact words -- to assemble and run a slate. But the district court and the circuit court found that it was impossible -- severely burdensome, actually impossible -- for that burden to be met.

JUSTICE STEVENS: May I ask you this question, Mr. Schwarz. Supposing that the statute did not contain the delegate-selection process and instead, said: Delegates shall be selected by the county chairman in each county and by the organization. Would it then be unconstitutional?

MR. SCHWARZ: If it said delegates will be selected --

JUSTICE STEVENS: By party officials.

MR. SCHWARZ: I'm not sure about that. I'm not -- I think that -- I'm not sure. I think it's different than Justice Souter's hypothetical.

JUSTICE STEVENS: I'm just saying just eliminate this whole folderol about picking delegates and say the county chairman shall pick the delegates,

period. I don't see why that would be unconstitutional.

MR. SCHWARZ: I'm not sure I have a position on that one way or the other. What I do say, though, is this Court in your Minnesota Republican Party v. White decision said it makes -- and, you know, the question of whether judges should be elected or appointed is a controversial question. But this Court in that decision said that if you're going to have an election -- and here we have elections for delegates -- if you're going to have an election, you shouldn't structure that election in a way that makes it in that case extremely difficult or impossible or forbidden --

JUSTICE STEVENS: Mr. Schwarz, you're talking about the election of the judge or the election of the delegate? I think you're mixing two oranges and apples there.

MR. SCHWARZ: Well, the -- I do believe that the election of the delegates raises the constitutional questions about has the State put its thumb on the scale, has the State done something that severely burdens the voters.

JUSTICE STEVENS: It -- the evidence shows the thumb on the scale is just as strong as if the party chairman picked the delegates. And, therefore, it seems to me, it presents the question of whether it would be

unconstitutional to enact a statute that allows the party chairman to pick the delegates.

MR. SCHWARZ: I'm not sure, Your Honor.

JUSTICE BREYER: Well, if you're not sure, it's difficult --

JUSTICE KENNEDY: If I could interrupt, Justice Breyer, for just a moment. But in the Minnesota case the thumb on the scale was to deprive the constituents of a First Amendment right. Smith v. Allwright, it was a right not to be discriminated against race. Here what we're asking is: What is the substantive right?

MR. SCHWARZ: Well, I think here it is the right not to be burdened, severely burdened, in an election. And that just runs through all your cases --

JUSTICE SOUTER: No, but what you are calling -- and correct me if I am wrong. Maybe I misunderstand this. I think what you are calling the severe burden is the difficulty of assembling a whole slate that can control the meeting or have a majority in the ultimate meeting of that delegate, of those delegates, and therefore actually select the candidate who wants to put the slate together. And it's control over result rather than the capacity of any individual to get elected a delegate which I think you are

objecting to. Am I wrong?

MR. SCHWARZ: We have never said that there's a right to win. We have only said there's a right to meaningfully participate.

JUSTICE SOUTER: Yes, but when you say "meaningfully participate" you talk about putting -- and candidly talk about putting -- a slate of delegates together.

If I put a slate of delegates together, it is because once those delegates are selected they're going to support me; and that's why it -- I think your real argument is not that somebody has difficulty becoming a candidate for a delegate or even getting elected one. The difficulty that you're claiming is that it's hard for the intending judicial candidate to assemble a large enough group of people to give that candidate success once the delegates are elected. It's a success argument that you are making, not an access argument.

MR. SCHWARZ: No. It's a compete argument, not an access argument. And I do think the Constitution should be read to say that if the State passes laws that make it very hard for voters to band together or for insurgent candidates to compete, then -- and it is a severe burden, they have to justify it. And, by the

way, they haven't sought in their papers to justify it.

JUSTICE GINSBURG: Could a State decide it doesn't want candidates to have any part in this delegate-selection process? It thinks it's unseemly to have would-be judges engage in that kind of activity. So it structures the system that says that they choose delegates for a convention, but we don't want those delegates to be the delegates of any particular candidate. We want to insulate this process from would-be candidate influence. Would that be unconstitutional?

MR. SCHWARZ: The problem is that in the real world the statutes work to entrench the power of the party leaders and to prevent voters from, to use the Board of Elections' reply brief, I think, on page 5, to use -- or 17, to use -- the voters are not able to band together to try and influence the results at the conventions.

JUSTICE SCALIA: Of course not. You're really arguing against the whole purpose this scheme, which is not to have judges popularly elected. And you're saying no, we want them popularly elected. The purpose of the scheme is to -- is to have the people elect delegates and have delegates use their good judgments as to who -- as to who the best judge would

be. But you say, no, we want the people to have an input. I mean, it's contrary to the whole purpose of the scheme. Of course it works the way you say it does. It is designed to work that way. It's a basic judgment not to have judges popularly elected, and your objection amounts to saying no, judges ought to be popularly elected.

MR. SCHWARZ: We -- we have no problem with the convention, but we don't think that the -- either the insurgent candidate or the band of voters who wish to support that person should be, by the State, fenced out, severely burdened from attempting to --

CHIEF JUSTICE ROBERTS: But it's all right, I take it, if they don't prevail? For example --

MR. SCHWARZ: Yes.

CHIEF JUSTICE ROBERTS: -- the other side says that your argument is -- is implicated whenever a convention leads to a different nominee than the primary.

MR. SCHWARZ: No, that's -- that's not --

CHIEF JUSTICE ROBERTS: You don't think there's anything wrong with the convention deciding that the nominee is going to be someone other than the person who would prevail in the primary election.

MR. SCHWARZ: There is nothing wrong with

that, Your Honor.

CHIEF JUSTICE ROBERTS: So it's all right to fence them out to that extent?

MR. SCHWARZ: If you want -- if we want to call that fencing. I don't call that fencing. That's the -- if the convention is one that is put together without the State burdening the ability for people to get involved --

CHIEF JUSTICE ROBERTS: I take it, in evaluating the burden, we should look at how difficult it is for someone to be elected a delegate.

MR. SCHWARZ: I think you should also look at the -- since the party leaders run slates and they have no difficulty in running slates because -- for various reasons that the courts found, I think you should look at the question of slates as well as individual delegates. And in considering individual delegates, I do think that Mr. Dunne's amicus brief which describes, on his page 19, indicates that, you know, it's -- it's a little unrealistic to think that anybody other than --

CHIEF JUSTICE ROBERTS: Well, is that because Mr. Dunne was not supported by the party members at the convention --

MR. SCHWARZ: No, he wasn't --

CHIEF JUSTICE ROBERTS: -- for whatever higher office --

MR. SCHWARZ: He wasn't trying to be a judge, Your Honor. He -- he speaks about his desire to be a delegate and his being told that, you're not sufficiently reliable; we're not going to let you be a delegate.

CHIEF JUSTICE ROBERTS: What did he have to do to become on the ballot for delegate?

MR. SCHWARZ: If he wanted to be a single person running -- appearing as a gadfly --

CHIEF JUSTICE ROBERTS: 500 signatures, right?

MR. SCHWARZ: He needs the 500 signatures.

CHIEF JUSTICE ROBERTS: If we don't think that's a sufficient burden, do you lose?

MR. SCHWARZ: I think we have a difficult case, if you don't think that's sufficient burden. If you think --

JUSTICE KENNEDY: But the State -- the trial court didn't find that that was a burden.

MR. SCHWARZ: No, I -- I'm not -- I'm agreeing with the Chief Justice that I think that, if you thought that just running for one delegate slot was sufficient to solve the problem of a State statute that

was designed -- their words, their admission -- to entrench the power of the party leaders, I think that gives us a problem.

JUSTICE BREYER: Why? I mean I don't see how you avoid answering Justice Stevens's hypothetical? The reason I think you have to answer it is because the New York system is the system he described in the hypothetical, with a safety valve.

MR. SCHWARZ: The safety valve being?

JUSTICE BREYER: The safety valve being that the party leaders cannot just choose anybody. I mean, if it looks they're going to choose something really nutty, then there will be opposition to these delegates and something will happen.

MR. SCHWARZ: Well --

JUSTICE BREYER: So they have leeway, but you can't go too far.

MR. SCHWARZ: The record, Your Honor, and this is an extensive record, shows that the party leaders can choose and do choose people who are, to use your word, who are --

JUSTICE BREYER: You don't like that. That's why I say you have to answer it. If you feel that that's so terrible, then you say no, the Constitution forbids that, though you'd have to explain,

wouldn't you, why, with all its faults, that is not better in the judgment of New York than a system where people raise $4 million from the lawyers in order to run for office?

MR. SCHWARZ: We -- no, we -- we have not said that there needs to be a primary. We haven't said that. And sometimes our opponents leave the impression that we have said that. We haven't said that.

You know, there are -- get rid of the leaders --

JUSTICE GINSBURG: That's the -- that's the remedy that, the temporary remedy, that you sought was -- at the bottom line, the court's order was, until New York reacts to this decision, the candidates will be chosen by primary.

MR. SCHWARZ: Yes, the -- but the judge, Your Honor -- the judge did two things in imposing that remedy, three or four things actually:

He said, first, I'm not going to micromanage. I think the statutes are unconstitutional. I'm not going to get into all the details of fixing it because the Legislature should do that and the Federal courts shouldn't do that.

Second, he relied on the fact that the fall-back position in the State statutes is there is a

primary if there is no other system in place.

But, third and most important, he stayed his decision to give the Legislature time to address the question, and they were well on their way to addressing it when this Court gave us the opportunity to be here.

CHIEF JUSTICE ROBERTS: Do you agree it's not realistic that one way they would address it is by having an entirely appointed system?

MR. SCHWARZ: No, they -- they're entitled to do that.

CHIEF JUSTICE ROBERTS: I know they are entitled to it.

MR. SCHWARZ: Well, the --

CHIEF JUSTICE ROBERTS: As a practical matter, is that a realistic option in New York?

MR. SCHWARZ: If you look at the amicus briefs filed in our favor, the State bar, the City bar, the Fund for the Modern Courts, the City of New York all filed a brief in which they say, we think the right solution is to have an appointive system, and they're working to try to have that happen. And the governor has put forward a bill for an appointive system. But, they say --

CHIEF JUSTICE ROBERTS: Well, I'm sure he has. I mean that's in his interest.

(Laughter.)

MR. SCHWARZ: No, not --

CHIEF JUSTICE ROBERTS: I thought I read a representation somewhere in the briefs that it's unrealistic to expect that New York would move to an entirely appointive system. So that the options, if you're successful, the options will either be direct election of judges or a pure convention with no role for the voters at all.

MR. SCHWARZ: No, it could be a role for the voters that does not burden them in the way this statute burdens them.

And the -- that brief by the State bar and the Bar of the Association of the City of New York and the other groups who are strongly in favor of an appointive system, say to this Court, this is the worst of all worlds. And it -- this system, as also the amicus brief from the former judges who were responsible for appellate judges responsible for administering the New York State system, says that this system has undermined judicial independence and undermined confidence in the courts.

And that is -- you know -- that is clearly correct --

JUSTICE GINSBURG: There's also one view, I

think it was, in the Feerick Report that said, the worst thing in the world would be to return us to the primary system this system was intended to replace.

MR. SCHWARZ: Yes, the -- actually the Feerick report, which found that the party leaders all over State however have always made the picks, they voiced a favoring amending the law. They -- they think the law needs to be amended.

And Chief Judge Kaye, in her remarks after the decisions came down and after the Feerick Commission report came out, said the problems that had been revealed in this case are pervasive both systemically and geographically.

The Feerick Commission's view is that, unless there's public financing, in which case they'd favor some more involvement by the voters, is simply amend the portions of the law that make it so burdensome on competitors, on voters.

We're -- we're neutral. We just say this law is unconstitutional. And how it should be amended is up to the Legislature, but that it should be amended is -- there's a powerful case and, you know, I don't know where I am on the time here, but I commend to you the various amicus briefs that have come in on --

JUSTICE STEVENS: They're all policy

arguments about why this is a terrible statute. They're not necessarily constitutional arguments.

MR. SCHWARZ: No, they also speak --

JUSTICE STEVENS: And that's a vast difference.

MR. SCHWARZ: -- speak about the Constitution, and, indeed, it's not very often that you find, on a constitutional issue, both the Washington Legal Foundation and the ACLU coming in, as they have come in, to assert that this is an unconstitutional statute.

CHIEF JUSTICE ROBERTS: Well, it's not often you have both the Democratic Party and the Republican Party --

(Laughter.)

CHIEF JUSTICE ROBERTS: -- supporting it either.

MR. SCHWARZ: Yes, but then I -- I think you should look at the -- what you've said in -- not you, but your predecessor said in Eu, about we've never held that a political party's consent will cure a statute that otherwise is violative and, there are other quotes in Justice Scalia's Tashjian opinion and in -- in several other cases to that effect.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Schwarz.

MR. SCHWARZ: Thank you.

Mr. Olson, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF THEODORE B. OLSON
ON BEHALF OF PETITIONERS NEW YORK STATE BOARD OF ELECTIONS ET AL.

MR. OLSON: Thank you, Mr. Chief Justice.

The Second Circuit reinstalled what the New York Legislature found to be a bad system, that it discouraged qualified candidates and it encouraged this unfortunate, unseemly race for money.

The Respondents just said that that is not what they were interested in doing, but their prayer for their relief, on page 35 of their complaint, calls for a direct primary election for the Supreme Court.

With respect to the Kusper case, Justice Kennedy, I gave that a little bit more thought. That -- that case focused on the fact that the statute was inhibiting the rights of an individual who wanted to participate in a way that the party wanted that individual to participate. That long period of time prevented both the individual and the association from associating together, which is why --

JUSTICE KENNEDY: You say the State, your mean the State statute?

MR. OLSON: Yes. But -- and to the extent that it was -- it was -- part of that is answered by your Clingman case which just came relatively recently, where the party wanted independents to vote in the primary and the Supreme Court -- this Court said that the State had to let that happen. With respect to time periods between when you had to identify yourself as a party member this court held in the Rosario case that a certain length of time is appropriate under the system.

With respect to Mr. Dunne, we've heard about him. He may have had a desire to be a delegate but he never tried to get the 500 signatures. It says that right on his -- on page 19 of his brief -- the brief that my colleague was quoting.

With respect to the questions that I think both Justice Stevens and Justice Souter were asking, could the State lodge the candidate selection or the delegate selection process in the party leaders, I can't conceive of how that would be unconstitutional.

If the parties wanted to select the delegates or select the candidates to be their standard bearers, that seems to me to be perfectly within the right of an association to do; and would be perfectly appropriate, provided that there was an access for independents and --

JUSTICE SCALIA: You're not saying the State could compel that?

MR. OLSON: No. No.

JUSTICE SCALIA: You're saying that the State could permit it?

MR. OLSON: No. But I think those hypothetical questions are could the State vest that authority.

Finally I think it's important to say -- oh, one more preliminary point. It is competitive in New York. It may not be perfectly competitive, as is the case of 90 percent of the congressional districts in this country, which are said not to be competitive. But in New York, six sitting judges testified in -- in -- in the lower court that they successfully lobbied delegates to, you know, to be candidates. So that happens.

Between 1900 and 2002, this is appendix 130, nearly one fourth of the general elections in New York were competitive.

Lopez Torres, the Respondent, received 25 votes at the 2002 judicial selection convention, and many of the districts in New York are not dominated by a single party.

So the final point is it is important to emphasize this is a -- a challenge on its face to the

statute that simply creates a delegate election and it then creates a convention. Neither of those provisions can possibly be constitutional, and so what the Respondents are complaining about is what party bosses do.

But on page 38 of their brief, they state categorically that the constitutional offense is not the fact that party leaders act as one would expect in choosing nominees.

In other words, they act -- party leaders act like party leaders and exercise their influence. They're not saying that that's unconstitutional. What they're saying is that a statute that allows party leaders to be party leaders, to be constitutional, to act in ways which are not only permissible under the Constitution as they knowledge, but constitutionally protected, is somehow constitutional. That simply is not consistent with any of this Court's jurisprudence, which says that political parties must have the maximum opportunity to select their leadership.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you Mr. Olson.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

A
ability 21:10 44:7
able 13:14 37:12 42:16
above-entitled 1:13 55:25
absolutely 24:4 24:9 30:3
acceptable 13:3
access 5:13,17 6:20 8:17 12:17,19 13:4 13:16,24 14:1 16:24 32:3 33:8 41:18,21 53:24
achieve 29:24
ACLU 51:9
act 55:8,10,10 55:14
activity 21:13 25:7 42:5
actual 20:17
additional 26:12
address 48:3,7
addressed 9:7
addressing 48:4
administering 49:19
admission 46:1
admitted 26:18
adopt 23:5
adopted 8:3 24:15
advance 8:6 18:17 23:13
affair 22:12
ago 24:25
agree 11:4 18:8 18:9 24:9 48:6
agreeing 45:23
agreement 10:24
ahead 20:20 31:5 37:14
al 1:4,8,18,21 2:5,8,14 3:9 17:6 52:6
ALITO 26:24 27:8,15,18
allow 8:1 15:16 16:14
allowed 7:16,19
allowing 12:15
allows 4:5 40:1 55:13
Allwright 40:10
amend 50:17
amended 50:8 50:20,21
amending 50:7
amendment 4:24 8:18 10:4 11:8 14:8 15:10 16:8 21:14 22:12 40:9
American 6:17 6:18 9:4 24:24
amicus 24:19 26:13 44:18 48:16 49:18 50:24
amounts 43:6
analogy 31:7 32:6
analysis 37:7
analyzed 26:20
analyzing 14:22
ANDREW 1:19 2:6 17:4
answer 13:22 15:12 16:21 46:6,23
answered 35:3 53:2
answering 11:5 46:5
answers 6:3 7:7
anybody 44:21 46:11
apart 15:6
apathy 19:9 23:9
apogee 14:10
appear 19:21 20:2,6
APPEARAN... 1:16
appearing 45:11
appellate 49:19
appendix 54:17
apples 39:16
applicants 20:15
application 31:7
apply 25:5 29:12 29:13 32:17,18
appointed 39:6 48:8
appointive 48:20,22 49:6 49:16
approached 37:16
appropriate 18:14 30:5 53:9,24
appropriately 30:23
approximately 19:1
arbitrarily 10:4
arena 23:2
argue 12:10
arguing 42:20
argument 1:14 2:2,11 3:3,7 9:8,13,19 11:14,18 17:4 25:21 36:4 41:12,18,19,20 41:21 43:17 52:4
arguments 51:1 51:2
arises 24:6
Aside 15:4
asked 16:19
asking 21:6 30:6 40:11 53:16
aspirations 4:6
aspiring 31:24 35:13
assemble 38:4,6 41:16
assembling 26:21 40:19
assembly 26:23
assert 51:10
assessing 28:25
assessment 28:18
associate 5:15 22:22,23 27:4 27:20
associated 11:20
associating 52:23
association 11:18,20 15:25 16:8 18:13,15 27:2,19,22 49:14 52:22 53:23
associational 4:24 12:16 16:9 21:13 25:6 26:25 27:1
associations 15:17
Assuming 26:24
attach 22:13 25:3
attain 32:19
attempt 13:5,5 38:4
attempting 43:12
attributable 23:8,9,11
authority 54:8
automatically 37:18
autonomous 23:19
autonomy 23:16
availability 19:3
avoid 29:21 46:5
aware 15:12
a.m 1:15 3:2 55:24
A.O 1:22 2:9 25:21

B
B 1:17 2:3,12 3:7 52:4
back 14:2
bad 52:9
ballot 4:15,23 6:11,14 7:2 8:14 13:4 19:17 26:6 29:2 32:17 33:8 45:9
band 26:3 41:23 42:16 43:10
bar 48:17,17 49:13,14
bare 21:8,11 23:24
barrier 17:14 31:10
barriers 12:6 30:10
based 31:8 34:20
basic 12:5 43:4
basis 15:5
bearers 53:22
becoming 41:13
behalf 1:17,19 1:23 2:4,7,10 2:13 3:8 17:5 25:22 34:19 52:5
beliefs 15:15
believe 23:8 24:13 39:17
belong 11:23
best 6:3 16:21 23:13 28:4 42:25

better 24:12 47:2
bill 48:22
bit 52:17
bite 28:22
blanket 6:7
Board 1:3,18 2:5,14 3:4,9 30:12 38:1 42:15 52:6
body 13:18
boss 9:18 35:22 37:4,11,16,16
bosses 31:19 33:13,17,19 35:14 36:9,13 37:1 55:4
bottom 47:13
Boy 37:17
Breyer 19:13,19 19:25 20:9 40:4,7 46:4,10 46:16,22
brief 24:20 26:14,17 38:1 38:2 42:15 44:18 48:19 49:13,18 53:13 53:13 55:6
briefs 7:9 48:17 49:4 50:24
bringing 34:19 34:20
broad 4:7,8
broader 8:9
burden 4:22 5:23 6:16 12:11 25:11,13 26:5,8,11,20 27:24 28:25 29:4 31:1,12 31:14,17 38:9 40:19 41:25 44:10 45:16,18 45:21 49:11
burdened 40:14 40:14 43:12
burdening 44:7
burdens 26:2 39:21 49:12
burdensome 5:7 8:12 38:9 50:17
business 15:18 34:9

C

C 2:1 3:1
California 9:23
call 32:23 44:5,5
called 7:11
calling 40:17,18
calls 52:14
campaign 12:24
campaigning 29:21
candidacies 21:16 25:7
candidate 6:20 11:10 13:9 14:11 18:13 20:5,24 26:4 31:24 33:5,12 33:20 36:5 40:22 41:13,15 41:17 42:9,10 43:10 53:17
candidates 3:13 3:15,17,20,25 6:9,10 8:17 9:1 9:21 10:2,9,21 18:5 20:2,6 21:2,11,20 22:4,21 23:21 25:8,8 31:22 41:24 42:3 47:14 52:10 53:21 54:16
candidly 41:7
capacity 31:23 32:4 40:24
case 3:4 4:3,7,14 4:19,21 5:1,2 5:14 6:2,3,17 8:20 9:23,24 9:24 13:8 14:23 16:19 17:12,12 18:10 19:24 20:16 21:2,4 22:2 24:3,10 27:1 28:7 29:7,9 32:15 33:3 34:19,20,25 35:24,25 36:8 36:16 39:11 40:8 45:18 50:12,15,22 52:16,18 53:3 53:8 54:12 55:23,24
cases 5:4 6:17 7:4,7 15:8,11 15:13 16:22 18:21 22:17 27:9 28:4,12 28:13,15,16,17 28:22,23 29:11 29:12 31:8 32:8,12,13 40:15 51:24
categorically 55:7
causes 19:10
certain 14:4,20 53:9
cetera 5:23
chairman 20:18 26:15 38:15,25 39:24 40:2
challenge 54:25
chance 33:6 37:3,4
charged 27:15
Chief 3:3,10 6:23 16:16 17:1,7 21:17 25:18,23 29:6 29:15,18 30:6 30:13,19 43:13 43:16,21 44:2 44:9,22 45:1,8 45:12,15,23 48:6,11,14,24 49:3 50:9 51:12,16,25 52:7 55:22
choice 7:3 22:6 22:24 24:23
choices 22:20
choose 7:16 9:21 19:15 20:13 22:21,22 23:20 25:1 42:6 46:11,12,20,20
chooses 8:13
choosing 21:15 55:9
chose 15:3
chosen 25:2 29:25 47:15
circuit 3:22 8:6 24:20 26:1 38:7 52:8
cite 9:23
City 18:25 37:10 48:17,18 49:14
civil 19:5
claim 30:4 32:8 33:4,8 34:18
claiming 37:2,2 41:14
clamoring 32:16
Clause 7:10 15:7 15:13
clear 5:6 8:10 9:1,3 28:8
clearly 22:5 24:21 49:23
clerk 36:18
clients 31:13
Clingman 53:3
closest 19:6
coerce 11:2
colleague 53:14
come 9:12 14:2 23:4 50:24 51:10
comes 11:14 27:24
coming 51:9
commend 50:23
comment 32:9
comments 32:11
Commission 50:10
Commission's 50:14
committee 1:21 2:8 17:6 26:15
common 15:15
communicate 11:10
compel 54:2
compelling 31:3
compete 41:20 41:24
competing 30:11 32:16
competition 9:9
competitive 54:10,11,13,19
competitors 50:18
complaining 6:12 31:13 55:4
complaint 52:14
complaints 32:3 32:4
complicated 9:20
compulsion 15:3
conceded 17:13 18:10 38:2
concededly 31:9 31:10
conceive 53:19
concerned 12:16
conclude 27:13
concluded 3:22
conclusive 29:3
confidence 49:22
confirmed 26:1

conflict 27:1
confusion 22:16
congressional 54:12
consent 35:5 51:21
consider 17:17 25:5 36:13
considering 17:16 44:17
consistent 55:17
constituency 8:9
constituents 40:9
Constitution 14:19 16:25 18:3 23:10 41:21 46:25 51:7 55:15
constitutional 4:8,16 5:14,24 15:6 18:11,15 19:12 21:3,7 22:19 23:14 33:15 34:1 35:15 36:6 39:18 51:2,8 55:3,7,14,17
constitutionali... 20:19,23
constitutionally 55:16
contain 38:13
contend 21:13
contest 19:3,4
contested 19:2,7 19:9
context 10:5 14:21 32:18
contours 24:24
contrary 43:2
control 9:14 33:14 40:20,23
controlling 36:9
controversial 39:7
convention 3:23 7:14 9:6,10,11 10:12,13 17:21 18:7,18,19 19:14,15,20 20:7,13,14 21:24 23:25 25:13 30:1,4,7 30:10,15 38:5 42:7 43:9,18 43:22 44:6,24 49:8 54:21 55:2
conventions 3:21 8:7,7 9:12 25:1,3 30:5 42:18
core 21:13 22:12 22:19 24:22 25:6
correct 12:18 19:18 26:11 40:17 49:24
correctly 16:19
corrupting 3:16
countervailing 25:14,15 28:1
country 54:13
county 1:20 2:7 17:5 38:14,15 38:25
course 7:1 22:10 35:6 42:19 43:3
court 1:1,14 3:11,14 5:4 6:5 6:15 7:17 9:4,6 9:7,10,22,24 11:6,7 13:2,10 13:25 14:4,6 14:14 16:13 17:8 18:8 19:5 21:3 22:11,18 25:4,4,16,24 25:25 26:23 31:2 32:14,18 35:8 38:7,8 39:4,7 45:21 48:5 49:16 52:15 53:5,5,8 54:15
courts 18:2 26:20 30:23 44:15 47:23 48:18 49:22
court's 6:19 12:14 47:13 55:18
Cousins 17:22
create 22:19
creates 55:1,2
critical 18:20
cure 51:21
cut 26:22

D

D 3:1
day 33:4
days 4:16
decide 14:13,25 15:15,20 24:6 31:15 34:2 42:2
decided 9:25 16:13,19
deciding 43:22
decision 27:14 32:5 34:8 38:5 39:5,7 47:14 48:3
decisions 11:22 12:15 15:20 50:10
decision-maker 31:15
declined 36:17
decree 34:7
defeat 4:5
definition 8:8 11:25
delegate 3:23 8:14,21 13:1,5 17:23 18:16,24 19:2 21:6 26:6 26:18 31:11 39:15 40:21,25 41:13 44:11 45:5,7,9,24 53:11,18 55:1
delegates 3:19 4:12 6:24 7:3 7:12,13 8:12 9:16 12:25 13:6 17:11,13 17:20 18:17 19:15,15,20 20:3,3,10,13 20:14 21:10,15 21:19,25 25:8 26:22 31:25 36:2,10 38:14 38:17,24,25 39:9,18,24 40:2,22 41:7,9 41:10,17 42:7 42:8,8,24,24 44:17,18 46:13 53:21 54:15
delegate-based 18:6
delegate-conv... 4:4
delegate-sel... 38:13 42:4
democracy 23:25
democratic 1:20 2:8 11:24 13:12 17:6 19:16 20:18 23:20 37:10 51:13
denial 21:6
deprive 40:8
described 33:23 33:24,25 34:6 46:7
describes 26:17 44:19
deserve 25:10
designed 20:12 43:4 46:1
desire 45:4 53:11
desired 31:23
detail 26:1
details 47:21
determining 10:21
developing 25:7
difference 7:15 18:6,19 51:5
different 6:4 20:15 23:25 27:8,14 33:24 34:23,25 35:2 35:15 36:7 38:22 43:18
difficult 4:14 12:21 20:22 37:24 39:12 40:5 44:10 45:17
difficulty 26:21 31:19,20 32:6 36:12 40:19 41:12,14 44:14
direct 18:12 29:19 32:8,12 33:7 49:7 52:15
directly 18:5 31:25 33:12 37:1
disallowed 15:2
discouraged 3:14 52:10
discredited 4:2
discriminated 40:10
disputes 34:4
dissident 31:21
distinction 33:23
district 25:25 35:16 38:7
districts 26:23 54:12,22
divides 37:22

doing 11:2 30:25 52:13
dominated 54:22
draw 33:22
drawing 31:7 32:7
duly 12:2 14:12 22:24
Dunne 26:14 44:23 53:10
Dunne's 26:13 44:18
D.C 1:10,17

E

E 2:1 3:1,1
earlier 6:6 31:10
educated 21:10 21:25 22:1,3,8
educating 21:15
education 21:7
effect 28:14 29:1 31:14,22 36:9 51:24
effectively 33:5
either 9:5 12:19 43:9 49:7 51:17
elect 14:8 19:14 42:24
elected 3:19 11:21 12:2 14:12 18:17 22:24 31:22 32:5 33:18 39:6 40:25 41:14,17 42:21 42:22 43:5,7 44:11
election 3:13,20 4:12 5:13,18 6:13,21,24,25 7:4,7,12 8:11 8:18 9:6 10:5 11:15 12:20 13:9,10,13,16 13:18,20,25 16:4 17:10 19:8 21:3 22:11 23:4 27:23 29:7,8 29:11,11,19 31:8 32:8,12 32:22,22 33:11 35:22,22 36:1 39:8,10,11,14 39:14,18 40:15 43:24 49:8 52:15 55:1
elections 1:4,18 2:5,14 3:5,9 4:9,10 30:12 35:19,20 38:1 39:9 42:15 52:6 54:18
electoral 16:25 32:3
electorate 12:17
elects 7:2,3
eliminate 38:24
emphasize 54:25
enabled 3:23
enact 40:1
encouraged 52:10
endorse 22:21
endorsing 25:8
enemy 37:14
engage 42:5
entirely 48:8 49:6
entitled 5:25 48:9,12
entrench 28:14 42:13 46:2
entrenched 31:18
entrenches 35:7 35:10
enumerate 12:23
Equal 7:10 15:6 15:13
ESQ 1:17,19,22 2:3,6,9,12
establishment 37:19
et 1:4,8,18,21 2:5,8,14 3:9 5:23 17:6 52:6
Eu 9:24,24 22:17 51:20
evaluating 44:10
event 36:1
evidence 18:25 19:4 20:5 22:2 39:22
exact 38:6
example 21:2 22:22 43:14
exclude 10:2,5
exercise 3:24 7:3 55:11
exist 18:2,3
exists 14:1
expect 28:21 49:5 55:8
expected 21:25
expense 3:24
expensive 3:15
expertise 25:16 25:17
explain 46:25
extensive 31:1 46:19
extent 13:23 44:3 53:1
extremely 4:14 39:11

F

face 54:25
facially 4:1,4
fact 9:7 16:13 18:10 19:8,19 20:6,24 21:21 23:12 24:14 33:20 37:8 47:24 52:18 55:8
factor 5:11,14
fact-finding 31:1
fairness 5:25 17:11
faithful 9:18
fall-back 47:25
Families 13:11
far 5:3 12:16 13:2 46:17
faults 47:1
favor 28:23 48:17 49:15 50:16
favorable 14:12
favoring 50:7
Federal 35:9,16 35:18 47:22
feel 46:23
Feerick 50:1,5 50:10,14
fence 27:3 44:3
fenced 27:5 43:11
fencing 44:5,5
field 31:21
fielding 25:8 31:21
file 11:14,17,25 14:12
filed 24:19 48:17 48:19
final 19:17 54:24
Finally 13:14 54:9
financing 50:15
find 20:10 29:2 45:21 51:8
finding 20:14 26:8,11
first 3:4 4:18,23 8:18 11:7 14:8 16:8 20:22 21:14 22:12 26:13 28:6,12 28:20 32:11 35:4 37:6 40:9 47:19
fixing 47:21
focus 4:11
focused 31:17 52:18
folderol 38:24
forbidden 39:12
forbids 46:25
force 25:12
forcing 23:21,24
forget 20:18
form 13:5,6 15:15 21:9
former 49:18
forth 6:18 11:25 21:15
forward 8:13 48:22
found 26:1,23 30:19 38:8 44:15 50:5 52:9
Foundation 51:9
four 47:18
fours 28:7,21
Fourteenth 10:4
fourth 54:18
framework 21:8 21:9,12 23:24
FREDERICK 1:22 2:9 25:21
freedom 15:16 20:4
freedoms 14:8
frequency 19:4
friend 33:10
Fund 48:18
fundraising 3:16

G

G 3:1
gadfly 26:19

45:11
general 3:13,20 5:13,18 6:13 6:21 12:20 13:10,16,18,25 19:23 29:6,8 29:11 31:8 54:18
geographically 50:13
getting 13:1 16:22 17:14 33:6 36:12 41:13
Ginsburg 9:11 10:3 11:12,22 18:22 23:16 29:5 42:2 47:11 49:25
Ginsburg's 22:15
give 20:16 41:16 48:3
given 8:24 12:7
gives 9:14 17:18 46:3
giving 13:11
go 7:13 20:20 31:5 36:21 37:14 46:17
goes 5:3 19:17
going 5:6 9:17 37:4 39:8,9 41:11 43:23 45:6 46:12 47:19,21
good 29:20 36:24 42:24
gotten 29:1
governor 48:21
granted 30:23
great 12:11 26:1
greatest 14:3
group 15:14 41:16
groups 49:15
guess 28:11 31:20 32:10

H

hand 20:12,14
hands 22:6
happen 46:14 48:21 53:6
happening 23:8
happens 29:2 32:23 37:8 54:16
happy 24:7
hard 41:15,23
hear 3:3
heard 53:10
hearing 31:2
held 4:8 6:8,15 6:19 7:17 14:19 31:2 51:20 53:8
hierarchy 27:3
higher 45:2
hire 36:17
history 37:8
hold 7:24 28:17
holding 9:10
Honor 25:17 27:10,21 30:4 30:9,18,24 34:12 35:24 37:5 40:3 44:1 45:4 46:18 47:17
hypo 34:23 35:1 35:14,21 37:1
hypothetical 4:13,21 11:5 36:8 38:22 46:5,8 54:7

I

idea 21:24 29:20
identify 53:7
identifying 11:13
ideology 37:22
implement 7:16
implicated 43:17
import 16:22
important 17:17 20:2 28:17 48:2 54:9,24
impose 9:2 14:24
imposed 14:16 14:18 16:11 27:23,25
imposes 14:20
imposing 47:17
impossible 4:22 6:16 26:17 27:24 38:8,9 39:12
impression 47:7
inappropriate 25:5 30:5
include 27:19,22
includes 8:20
incorrect 26:9
independence 49:21
independent 13:17
independents 16:14 53:4,25
indicated 13:3
indicates 44:19
indicative 29:4
indirect 3:18
individual 8:24 12:24,25 13:4 13:6 17:19 20:2 40:24 44:17,17 52:19 52:21,22
individuals 8:8 12:17 13:20 16:24 22:23
influence 3:24 31:24 32:4 37:3 38:5 42:10,17 55:11
influencing 31:14
informed 21:19
inhibiting 52:19
input 23:6 43:2
insist 9:9
insofar 6:1
instances 20:25
instructs 17:22
insulate 42:9
insulation 29:21
insurgent 3:25 3:25 11:25 41:24 43:10
insurgents 4:6 26:2 27:4,5,18
intended 17:17 50:3
intending 31:24 33:5 35:12 36:5,11 41:15
intent 20:6,11
intents 5:8,9
interest 18:17 48:25
interested 52:13
interests 11:11 17:21 23:13 25:9
interfering 34:4
interrupt 40:6
intervened 24:10
intervening 34:9
intraparty 9:9
involved 4:24 5:12 44:8
involvement 50:16
issue 4:3,16 10:23 37:22 51:8

J

J 1:19 2:6 17:4
John 26:13,14
Jones 9:23 22:11 22:17 27:14
JR 1:22 2:9
25:21
judge 19:21 22:4 35:13 37:12 39:14 42:25 45:4 47:16,17 50:9
judges 8:2 22:2 29:19,21 35:17 39:6 42:5,21 43:5,6 49:8,18 49:19 54:14
judgeship 21:20
judgment 21:18 21:22 43:4 47:2
judgments 42:25
judicial 3:16 21:16,16 33:5 33:12 36:5,11 41:15 49:21 54:21
judiciary 26:15
jurisprudence 6:19 55:18
justice 3:3,10,14 4:11,19,21,25 5:3,5,16,21 6:23 7:19,23 8:10,15,22 9:11 10:3,7,13 10:15,19,22 11:1,12,22 12:4,10,13 13:10,23 14:4 14:15,16,23 15:5,9,21,24 16:1,4,10,16 16:18,18 17:1 17:7,10,16 18:22 19:13,19 19:25 20:9 21:17 22:15 23:16 24:2,5 24:14,25 25:18 25:23 26:5,24 27:8,15,18

28:3 29:5,6,8 29:15,18 30:6 30:13,19 31:4 31:6 33:3,24 33:25 34:6,10 34:14,17 35:9 35:21 36:3,19 37:13,15 38:11 38:19,22,23 39:13,22 40:4 40:6,7,16 41:5 42:2,19 43:13 43:16,21 44:2 44:9,22 45:1,8 45:12,15,20,23 46:4,5,10,16 46:22 47:11 48:6,11,14,24 49:3,25 50:25 51:4,12,16,23 51:25 52:7,17 52:24 53:16,16 54:1,4 55:22
justification 23:18 31:3
justify 41:25 42:1

K

Kaye 50:9
Kennedy 4:11 4:19,21,25 5:3 5:5,16,21 8:10 8:15 12:4,10 12:13 13:23 15:21,24 16:1 16:4,18 17:16 26:5 28:3 40:6 45:20 52:17,24
Kennedy's 17:10
key 19:3
kind 30:14 42:5
know 4:19 5:24 20:19 37:13,21 39:5 44:20 47:9 48:11 49:23 50:22,23 54:16
knowledge 55:16
Kusper 4:25 5:1 5:2,17 16:19 32:13 52:16

L

language 27:15 32:14
large 41:16
latitude 4:8 14:3
Laughter 30:21 37:20 49:1 51:15
law 12:5 13:25 33:19,23,24,25 36:17 50:7,8 50:17,20
laws 28:14 41:22
lawyers 47:3
leader 11:13,15 20:17,23 23:17 26:14 34:7
leaders 4:5 9:15 9:21 10:21 18:24 21:1 22:16,24 23:4 23:12 25:7 27:12 35:5 42:14 44:13 46:2,11,20 47:10 50:5 53:18 55:8,10 55:11,13,14
leadership 7:17 10:1 11:16,21 12:2 14:13 19:11 22:20 55:20
leads 43:18
leave 47:7
leeway 46:16
Legal 51:9
legislative 20:6 22:5 24:17,23 25:16
legislature 3:18 24:16,19,20 47:22 48:3 50:21 52:9
length 53:9
let's 4:15 23:17 29:18
level 6:22 13:3
lever 17:23
likes 34:15,16
limitation 36:4
line 47:13
listen 36:14,15 36:16
little 44:20 52:17
lobbied 54:15
lobbies 37:1
local 17:20
locally 18:16
lodge 53:17
lone 26:19
long 6:19 8:16 10:4 30:9 52:21
look 5:25 26:13 28:25 30:11 44:10,12,16 48:16 51:19
looking 5:21
looks 46:12
Lopez 1:7 13:8 54:20
lose 45:16
lost 13:13
lot 36:21
lower 18:2 25:4 54:15
loyal 25:9
Lubin 32:13,13

M

major 6:9,10 24:11
majority 40:20
making 11:15 32:7 41:18
manner 4:9 8:1
MARGARITA 1:7
matter 1:13 32:21,24 48:15 55:25
maximum 15:16 55:19
mean 43:2 46:4 46:11 48:25 52:25
meaningfully 41:4,6
meet 19:20
meeting 40:20 40:21
member 12:24 15:23 53:8
members 3:25 7:12 9:14 10:3 10:5 23:6,14 26:3 27:13 38:3 44:23
membership 13:12
mentioned 7:8 31:9
merely 8:1 14:17 22:10
met 38:10
micromanage 47:20
million 47:3
Minnesota 39:4 40:7
minutes 52:3
misunderstand 40:18
mixing 39:15
Modern 48:18
moment 40:7
moments 24:25
money 29:22 52:11
motivation 22:7
move 49:5
multiple 24:18 32:16,19
Munro 6:3

N

N 2:1,1 3:1
names 13:1
nearly 54:18
necessarily 51:2
need 4:15
needs 22:9 45:14 47:6 50:8
Neither 55:2
neutral 50:19
never 28:10 37:6 37:8,11 41:2 51:20 53:12
New 1:3,18,19 1:20,22 2:4,7 2:13 3:4,8,12 13:20 17:5 18:24,25 19:24 20:25 23:21,23 24:15 26:15 33:16 37:9,10 46:7 47:2,13 48:15,18 49:5 49:14,20 52:5 52:8 54:10,14 54:18,22
nomenclature 7:14
nominate 3:13 31:15
nominating 10:1
nomination 13:15 18:5,14 31:23 32:20,25
nominee 14:5 19:16,17 35:14 36:11 43:18,23
nominees 21:16 29:25 55:9
nub 33:4 36:8
number 31:18 31:19
nutty 46:13

N.Y 1:19,22

O

O 2:1 3:1
objected 8:23
objecting 34:11 34:24 41:1
objection 33:15 43:5
objective 29:25
observed 22:11 24:25
October 1:11
odd 30:14
offense 55:7
office 4:10 45:2 47:4
official 19:16
officials 38:19
oh 54:9
Okay 27:17 36:3
Olson 1:17 2:3 2:12 3:6,7,10 4:12,18,22 5:2 5:11,20 6:2 7:6 7:21 8:5,15 9:3 9:22 10:11,14 10:19,25 11:4 11:19 12:9,13 14:21 15:4,8 15:11,24 16:3 16:5,11,20 17:2 21:23 52:3,4,7 53:1 54:3,6 55:22
once 17:22 31:22,25 41:10 41:17
ones 7:8 29:14 33:14
open 5:9 6:7 12:19 16:13 19:5
opening 38:2
opinion 51:23
opponents 47:7
opportunity 17:20,22 18:4 18:12 22:7 48:5 55:19
opposed 14:17 37:11,16
opposition 46:13
option 48:15
options 49:6,7
oral 1:13 2:2 3:7 17:4 25:21
oranges 39:15
order 47:3,13
ordinary 27:13
organization 38:15
ought 29:20 32:15 43:6
outset 24:10

P

P 3:1
page 2:2 26:16 42:15 44:19 52:14 53:13 55:6
Panish 32:13,14
papers 42:1
parallel 19:6 32:7
part 16:7 20:22 21:24 35:12 37:18 42:3 53:2
participants 17:18
participate 5:10 12:22 13:20 21:14 25:12 37:24 41:4,6 52:20,21
participation 6:1 12:7 29:23 34:21 35:12 36:5
particular 22:23 36:16 42:8
particularly 4:10 7:9
parties 3:23 6:10 8:17,23 8:25 10:20 12:17 13:7 14:3 16:24 19:11 21:12 22:13,16,18,21 22:25 24:2,7 24:10,11,15 32:16 34:24 53:20 55:19
party 3:13,19,21 3:25 4:5,6 6:11 6:18,20 7:12 7:16 8:3,25 9:4 9:14,15,18,18 9:21,23,25 10:3,6,9,16,23 11:2,8,9,12,13 11:13,15,16,21 11:24,24 12:3 13:11,13,15 14:6,7,13 15:1 15:2,14,22,23 16:2,3,5,6,12 16:14 18:23 19:10,16 20:19 20:23 22:12,16 23:4,11,17,18 23:19 24:24 25:3,6,9 26:3 27:3,12 28:1 30:8 33:12,19 34:2,4,7,10,14 34:14,16,19 35:5,14,22 37:9,10,11 38:3,19 39:4 39:23 40:2 42:14 44:13,23 46:2,11,19 50:5 51:13,14 52:20 53:4,8 53:18 54:23 55:4,8,10,10 55:13,14
party's 11:11 25:12 51:21
passes 41:22
penalized 30:16 30:18
penalizing 30:24
penalty 30:20
people 12:1 15:14,19 18:23 19:10,21 29:1 30:11 32:19 34:18 36:21 41:16 42:23 43:1 44:7 46:20 47:3
percent 6:12 19:1,7 54:12
perfectly 18:14 53:22,23 54:11
period 39:1 52:21
periods 53:7
permissible 55:15
permit 54:5
person 11:10 12:22 14:10,11 14:12,14 31:16 36:17 37:1,15 37:17 38:3 43:11,23 45:11
persuade 13:5
pervasive 50:12
Petitioners 1:5 1:18,20 2:4,7 2:13 3:8 17:5 52:5
phase 18:14
pick 21:2 38:25 40:2
picked 9:18 39:24
picking 35:16 38:24
picks 50:6
place 4:9,18 11:7 12:6 28:6 32:16 48:1
placed 26:2,3
plain 9:8
plaintiffs 26:24
please 3:11 17:8 25:24 29:17
point 6:6,8 7:18 14:2 28:11 54:10,24
points 26:12 28:19,20 31:18 31:20
policy 22:5 50:25
politic 20:3 33:6
political 3:12,20 3:23 6:10,17 6:20 8:17 9:25 10:20 11:9,21 12:3 13:15 14:2,13 15:14 15:21 16:24 21:1 23:2 31:19 33:13,17 35:12 36:9,13 36:20 51:21 55:19
politics 36:23
popularly 42:21 42:22 43:5,6
portions 50:17
pose 21:7 36:7
posed 34:23
position 8:11 18:24 19:21 39:2 47:25
positions 6:9
possible 14:3
possibly 55:3
potential 21:16
potentially 3:16
power 20:17 24:22 28:14 31:18 42:13 46:2
powerful 50:22

powers 14:7
practical 48:14
practice 6:4,5 18:22 35:10
prayer 52:13
precisely 33:17
preclude 21:10
predecessor 51:20
prefer 25:16
preferences 17:24
preliminary 8:20 9:15 28:20 32:24 54:10
premise 12:18 34:20
prerogative 23:10
prescribe 4:9
present 24:19
presents 39:25
pretty 30:20
prevail 43:14,24
prevent 20:14 42:14
prevented 52:22
primaries 3:13 19:5 25:1
primary 3:19 4:2 5:6,8,19 6:1,7,13,22,24 7:4,7,11 8:19 8:21 9:6,9,16 10:10,11 12:5 12:7,20 13:24 15:22 16:2 18:7,9,11,20 21:23 24:12 29:12 32:12,18 32:22,23 43:19 43:24 47:6,15 48:1 50:2 52:15 53:5
principle 5:22 5:24 6:16 8:5 13:24 15:6 28:13 31:8 34:21
principles 28:12 28:23 29:10,13 29:13 32:11
probably 24:14
problem 19:12 21:7 23:1,2,15 31:6 36:6 42:12 43:8 45:25 46:3
problems 29:21 50:11
process 3:14 4:2 6:7,13,21 7:15 7:18 8:18,19 8:20 10:2 12:21 13:21 14:7 16:25 17:19 18:18 21:24 22:6,10 23:5 24:18 29:24 32:3 36:10 37:3 38:13 42:4,9 53:18
proposed 8:14
proposition 28:4
protected 21:13 55:16
protection 7:9 7:10 11:8 15:6 15:13
protects 11:7
protesting 24:3
provide 33:19
provided 5:12 6:22 33:16 34:24 53:24
provides 8:16 35:19
provisions 55:2
public 50:15
pull 17:23
pure 30:15 49:8
purpose 42:20 42:23 43:2
purposes 5:9,9 35:15
put 8:13 22:6 30:17 33:9 39:19 40:23 41:9 44:6 48:22
putting 21:15 34:3 41:6,7

Q

qualifications 20:10,15 21:19
qualified 3:15 14:14 52:10
question 13:22 17:10,16 20:22 21:5 22:14,15 27:11 33:9,11 35:3 36:7 37:23,25 38:12 39:5,7,25 44:16 48:4
questions 11:5 16:6 39:19 53:15 54:7
quite 25:5 28:8
quotes 51:22
quoting 9:24 53:14

R

R 3:1
race 40:11 52:11
raise 47:3
raised 4:16
raises 39:18
raising 29:22
rally 19:11
rank 11:14,17 11:24 14:12
rank-and-file 9:14 12:24 18:4 22:1,3 23:3,6,13 25:11
rarely 29:3
reacts 47:14
read 41:22 49:3
reading 22:17
real 41:12 42:13
realistic 28:18 29:1 48:7,15
really 9:16 14:14 28:21 32:22 35:5 37:17,23,25 42:20 46:12
reason 23:7,7 46:6
reasonable 5:13 5:17 6:20 8:16 12:19,21 16:23 33:6
reasons 36:20 44:15
rebel 37:18
rebelling 12:2
REBUTTAL 2:11 52:4
recalled 22:9
received 54:20
recognized 22:18 24:25
recommending 25:7
record 19:5 25:25 46:18,19
reduces 9:20
reference 8:11
regard 6:24
regarding 17:10
registration 5:7 13:12
reinstalled 52:8
reinstated 4:2
relatively 53:3
reliable 45:6
relied 3:12 47:24
relief 52:14
rely 18:16 27:9
remaining 52:3
remarks 50:9
remedy 23:2,3 47:12,12,18
repeatedly 4:8 7:17
replace 50:3
reply 38:2 42:15
report 50:1,5,11
represent 8:8 17:21 36:12
representation 49:4
representative 23:24
Republican 9:23 11:24 26:14 37:9 39:4 51:13
require 7:24 9:5 10:9
required 7:20 18:3
requirement 13:4 16:7 17:13 18:12
requirements 5:7 14:22
requires 7:21 26:7
reserve 16:16
reserves 11:8
respect 8:19 10:20 11:5 12:15 13:24 14:5 52:16 53:6,10,15
respond 20:21
Respondent 13:8 54:20
Respondents 1:23 2:10 8:6 18:1 25:22 52:12 55:4
responding 17:9
response 22:14 33:11
responses 17:12
responsible

49:18,19
restrict 10:8
restriction 14:24
restrictions 14:5 14:17,18,20
restrictive 12:6
result 40:24
results 42:17
return 50:2
revealed 50:12
rid 47:9
right 6:23 8:19 9:4 10:1,3,8,14 11:23 15:19 16:9 17:24 18:9,11 22:19 24:13 27:4,12 27:16,19,19,21 27:22 28:2 37:2,3 40:9,10 40:12,14 41:3 41:4 43:13 44:2 45:13 48:19 53:13,23
rights 4:24 5:15 10:20 11:18,19 12:16 14:7 22:13 25:3,14 25:15 26:25 27:2 34:19 52:19
rise 35:2
ROBERTS 3:3 6:23 17:1 21:17 25:18 29:6,15,18 30:6,13,19 43:13,16,21 44:2,9,22 45:1 45:8,12,15 48:6,11,14,24 49:3 51:12,16 51:25 55:22
robust 25:25
Rodriquez 21:4
role 17:17,19
30:1,7,14,16 49:8,10
room 10:17,18
rooms 15:19
root 29:13
Rosario 53:8
Rossman 1:19 2:6 17:3,4,7 18:25 19:18,23 20:1,21 21:21 23:23 24:4,9 24:17 25:19 33:10 35:3
routine 25:6
run 9:17 13:16 13:17 18:24 38:7 44:13 47:3
running 26:21 44:14 45:11,24
runs 28:15 40:15

S

S 2:1 3:1
safety 46:8,9,10
satisfied 5:15 17:25
satisfies 16:25
saying 16:13,21 28:6 30:25 36:13,20,25 38:23 42:22 43:6 54:1,4 55:12,13
says 28:24 29:2 34:6 42:6 43:17 49:20 53:12 55:18
scale 34:3 39:20 39:23 40:8
Scalia 7:19,23 8:22 10:7,13 10:15,19,22 11:1 14:4,16 14:23 15:5,9 24:2,5,14,25 29:8 31:4 33:24,25 37:15 42:19 54:1,4
Scalia's 51:23
scheme 42:20,23 43:3
Schwarz 1:22 2:9 25:20,21 25:23 26:10 27:7,10,17,21 28:5 29:10,17 30:3,9,17,22 31:4 32:10 33:22 34:12,16 35:4,18,23 36:14 37:5,21 38:12,17,20 39:2,13,17 40:3,13 41:2 41:20 42:12 43:8,15,20,25 44:4,12,25 45:3,10,14,17 45:22 46:9,15 46:18 47:5,16 48:9,13,16 49:2,10 50:4 51:3,6,18 52:1 52:2
Scram 36:23
scrutiny 25:6,10
Second 3:22 8:6 24:20 26:1 47:24 52:8
secondly 17:15 26:20 28:16
secure 13:15
see 33:7,15 35:24 39:1 46:4
seek 30:22
seeking 32:19
select 3:20 9:1 10:1,1,2,9 14:9 22:4 33:20 35:14 40:22 53:20,21 55:20
selected 14:6,10 18:23 31:25 33:7 38:14,18 41:10
selecting 8:2 11:9,10 20:23 22:8
selection 8:21 9:16 20:17 22:6 53:17,18 54:21
selections 8:8
selects 11:9
Senate 26:16
Senators 35:10 36:22,22
sensible 22:5 24:22
sensitive 23:12
served 38:6
serving 28:14
set 30:10
sets 27:2
settled 9:9
severe 26:2 28:25 29:4 30:10,20 40:19 41:25
severely 31:1 38:8 39:20 40:14 43:12
sham 9:17
shape 21:9
shapes 9:12
share 24:11
shares 17:23
short 32:1
show 31:3
shown 4:13
shows 39:22 46:19
shuts 9:13
side 9:19 12:1 28:2 33:10 43:16
signature 13:2 31:12
signatures 4:15 4:20 13:17 17:14 45:12,14 53:12
significantly 34:23 35:2,15
simply 7:2 50:16 55:1,17
single 26:6 45:10 54:23
sitting 54:14
situation 4:17 7:5 24:5
six 54:14
sizes 9:12
slate 18:23 26:22,22 31:21 38:4,7 40:20 40:23 41:7,9
slates 13:5 19:2 44:13,14,16
slot 45:24
Smith 40:9
smoke 10:16
smoke-filled 10:17,18 15:18
Socialist 6:11
solution 48:20
solve 45:25
somebody 31:11 41:12
sorry 31:4
sought 42:1 47:12
Souter 31:6 33:3 34:6,10,14,17 35:9,21 36:3 36:19 37:13 40:16 41:5 53:16
Souter's 38:22
so-called 8:21
spawned 3:15
speak 51:3,6
speaks 45:4
special 11:7
specific 26:7,10

specifically 9:7
specifics 16:23
squelches 23:6
ss 24:23
stage 18:5 32:24 32:25
stake 26:25
stamp 23:11
stand 12:15
standard 53:21
standard-bear... 11:9 14:9,9
start 28:6,24
state 1:3,18 2:4 2:13 3:4,8 4:10 6:3,5 7:15,19 7:20,21,24,25 8:2,12,16 9:2,3 9:5,8 10:7,8,15 10:17,20,23 11:1 12:6 14:18,22,24,25 15:1,3 16:11 17:18 18:12 19:24 21:18,22 24:22 25:1,2 26:14,16 27:23 27:25 28:14 29:19 30:14,24 32:23 33:18 34:1,2,3,6,9 35:7 39:19,20 41:22 42:2 43:11 44:7 45:20,25 47:25 48:17 49:13,20 50:6 52:5,24 52:25 53:6,17 54:1,5,7 55:6
statement 13:23
States 1:1,14 4:7 20:25 28:9 35:10 36:22,22 37:14
State-mandated 12:5 16:2
State-run 22:10
statute 20:4,11 20:12,16 28:18 34:5 37:23 38:12 40:1 45:25 49:11 51:1,11,21 52:18,25 55:1 55:13
statutes 3:23 4:1 31:2 42:13 47:20,25
statutory 21:8,9 21:11
stayed 48:2
Stevens 16:10 16:18 38:11,19 38:23 39:13,22 50:25 51:4 53:16
Stevens's 46:5
stifle 5:18 27:12 27:16
Storer 28:24,24 29:2,5 37:7
strict 25:5,10
strike 8:7
strong 39:23
stronger 35:25
strongly 49:15
struck 4:1
structure 5:18 21:1 22:18,20 39:10
structures 42:6
submit 15:12
submitted 55:23 55:25
subsequent 8:9
substantive 40:12
substituted 3:18
success 37:2 41:17,18
successful 49:7
successfully 54:15
sufficient 45:16 45:18,25
sufficiently 45:6
suffrage 17:24
suggest 19:2 33:1 35:23
suggested 35:13
support 24:21 26:4 41:11 43:11
supported 44:23
supporting 51:16
suppose 4:13 7:25 21:17 24:6 29:18
supposedly 33:14
Supposing 38:12
supreme 1:1,14 3:14 13:10 14:14 52:15 53:5
sure 7:14 34:16 35:11,21 36:19 38:20,21 39:2 40:3,4 48:24
switch 13:6
system 3:19 4:4 5:6,8 6:1 8:16 9:13,20 23:22 23:23 24:12,15 27:23,25 28:9 33:16 35:6,7,9 35:13,16,19 42:6 46:7,7 47:2 48:1,8,20 48:22 49:6,16 49:17,20,20 50:3,3 52:9 53:9
systemically 50:12

T

T 2:1,1
table 12:1
take 19:13 43:14 44:9
takes 4:20 13:17
talk 7:7,9 41:6,7
talking 39:14
Tashjian 22:17 51:23
tell 12:8 36:10
temporary 47:12
terms 7:8,9 12:14 26:21 35:11
terrible 46:24 51:1
testified 54:14
Texas 6:18 9:5 24:24
thank 17:1 25:17,18 51:25 52:2,7 55:21 55:22
theirs 34:21
theme 28:15
THEODORE 1:17 2:3,12 3:7 52:4
theory 19:13
they'd 50:15
thing 17:17 20:2 22:9 25:4 50:2
things 15:19 23:9 37:6 47:17,18
think 4:23 5:2,3 5:5,11,16,20 6:2 7:4,6 8:15 12:7 15:21 16:20,21 18:8 18:20 20:24 21:5,21 22:5 22:14 23:5,14 24:21 25:9,11 25:14 26:6 27:10,11,11,21 28:1,22 29:19 30:18,23 33:2 33:22,23,25 34:2,5,8,12 37:2 38:21,21 39:15 40:13,18 40:25 41:11,21 42:15 43:9,21 44:12,15,18,20 45:15,17,18,19 45:23 46:2,6 47:20 48:19 50:1,7 51:18 53:15 54:6,9
thinks 29:20 42:4
third 48:2
Thirteenth 15:9
thought 12:5 45:24 49:3 52:17
three 28:20 31:20,23 47:18
thumb 34:3 39:19,23 40:8
time 4:9 6:6 19:7 29:22 32:1 48:3 50:23 52:21 53:6,9
times 24:18
title 20:18 33:20
titles 33:13
today 3:4
told 23:19 45:5
Torres 1:7 3:5 13:8 54:20
total 9:14 12:17
totally 11:4 24:7
transferable 7:4
trial 45:20
tried 16:20 53:12
troublesome 20:24
try 26:19 37:5 38:4 42:17 48:21
trying 11:1 45:3

turn 3:20
two 6:9 7:6 16:5 17:11 23:9 26:10,11 27:1 27:2 28:19 31:17,19 32:11 37:6 39:15 47:17

U

ultimate 31:15 32:5 40:21
ultimately 12:15 36:6
unconstitutio... 4:1,4 6:8 7:24 7:25 8:4 30:20 33:21 34:8 35:25 38:16 39:1 40:1 42:11 47:20 50:20 51:10 53:19 55:12
undermined 49:21,21
understand 16:8 31:13 33:18 34:18
understanding 7:1
unduly 12:6
unfolded 24:18
unfortunate 52:11
United 1:1,14 28:9 35:10 36:21,22 37:14
unity 19:10 23:11
unqualified 36:17
unrealistic 44:20 49:5
unreasonable 16:12 31:10
unreasonably 12:21
unseemly 3:15 20:7 42:4 52:11
upheld 14:4 21:3
upholding 14:18
upstate 37:10
urge 25:4
use 5:6 27:22 38:1 42:14,16 42:16,24 46:20

V

v 1:6 3:5 6:18 9:5,23 24:24 32:13,13 39:4 40:9
vacancy 21:2
values 17:23
valve 46:8,9,10
various 26:22 44:15 50:24
vast 51:4
vest 54:7
view 24:11 49:25 50:14
vigorously 11:7
violated 10:5
violative 51:22
voice 8:24 37:25
voiced 50:7
voices 27:12
voluntarily 8:3
vote 12:25 15:22 16:15 17:20 18:4 20:4 23:3 36:10 53:4
voter 18:13,15 19:9 21:6 29:19
voters 6:1 17:11 17:20 18:4,16 19:14 21:20 22:1,3 23:3 25:11 29:23 30:1,2,8,15,16 37:24 39:21 41:23 42:14,16 43:10 49:9,11 50:16,18
votes 6:12 26:7 54:21

W

want 5:23 8:25 11:3 14:23 16:12 23:20 27:5 28:25 29:23 32:10 36:13 42:3,7,9 42:22 43:1 44:4,4
wanted 16:14 38:4 45:10 52:19,20 53:4 53:20
wanting 26:6
wants 10:8,15 10:16 15:2 16:6 27:3 31:11 40:23
Washington 1:10,17 6:5 51:8
Washington's 6:4
wasn't 26:18 44:25 45:3
way 5:19 9:1 12:19 13:19,19 13:19 21:9,14 28:19,20 29:24 30:7 33:9 39:3 39:11 42:1 43:3,4 48:4,7 49:11 52:20
ways 12:23 55:14
Wednesday 1:11
week 6:6
went 21:23
We'll 3:3
we're 40:11 45:6 50:19,19
we've 51:20 53:10
White 6:18 9:5 24:24 39:4
Williams 32:15
win 41:3
wish 5:10 8:13 43:10
wished 26:3
wishes 10:17
word 46:21
words 20:11,20 27:3 38:6 46:1 55:10
work 42:13 43:4
worked 37:6
working 13:11 48:21
works 28:18 43:3
world 42:13 50:2
worlds 49:17
worried 28:13 32:15
worst 25:10,14 49:16 50:1
worthwhile 26:19
wouldn't 8:1 28:21 30:17 37:15 47:1
would-be 42:5 42:10
wrong 12:8,14 40:17 41:1 43:22,25

X

x 1:2,9

Y

Yeah 32:10 37:17
years 3:12 15:23 26:16 33:18
York 1:3,18,19 1:20,22 2:4,7 2:13 3:4,8,12 13:20 17:5 18:24,25 19:24 20:25 23:21,24 24:16 26:15 33:16 37:9,10 46:7 47:2,14 48:15,18 49:5 49:14,20 52:5 52:9 54:11,14 54:18,22

$

$4 47:3

0

02 1:15
06-766 1:6 3:4

1

1 6:12
10 1:15 3:12
10:02 3:2
11:03 55:24
12 19:1
13 19:1
130 54:17
17 2:8 42:16
19 26:16 44:19 53:13
1900 54:17
1921 24:18

2

2 33:18
2,000 4:15
2002 54:17,21
2003 13:9
2007 1:11
25 2:10 54:20
28 19:7

3

3 1:11 2:5
30 4:15
35 52:14
3500 13:17

38 55:6

4

4 15:23 52:3
4,000 13:17
4-year 16:6

5

5 42:15
500 4:20 13:1 17:14 26:7 31:12 45:12,14 53:12
52 2:14

9

90 54:12